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No. 80-1663

In the Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL., PETITIONERS

v.

ALLIED INTERNATIONAL, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In its initial memorandum, the government indicated that the National Labor Relations Board was considering three cases involving issues substantially identical to those raised in the petition, and that the Board expected to reach its decisions in sufficient time to enable the United States, if the petition were granted, to file a brief expressing its views on the merits of the issues presented. On August 28, 1981, the Board issued its decision in *International Longshoremen's Association, AFL-CIO,*

et al. (*Allied International, Inc.*), 257 N.L.R.B. No. 151, holding that the very conduct engaged in by the Union in the present case constituted a violation of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B). A copy of the Board's decision and order is appended hereto.

For these reasons as well as those set forth in the government's initial memorandum, the petition in this case should be granted and the case should be set for argument with *Jacksonville Bulk Terminals, Inc.* v. *ILA*, No. 80-1045.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1981

APPENDIX

257 NLRB No. 151

FJZ
D—8020
Boston, MA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 1—CC—1753

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

ALLIED INTERNATIONAL, INC.

DECISION AND ORDER

This case poses the issue of whether the National Labor Relations Board can assert jurisdiction over the allegedly unlawful secondary effects of a primary dispute between an American union and a foreign nation. We conclude that the Board can assert jurisdiction in this case and we do so. We find Respondents [1] have, by their refusal to load or unload cargo destined for or originating in the Union of Soviet Socialist Republics (USSR), engaged in conduct classically subject to and violative of Section 8(b)(4) of the National Labor Relations Act, as amended. The Administrative Law Judge in this case

[1] Respondents are the International Longshoremen's Association, AFL-CIO, and the International Longshoremen's Association, Local 799, AFL-CIO. They are collectively referred to as the International Longshoremen's Association (ILA).

concluded that the Board is deprived of jurisdiction over the alleged violation of Section 8(b)(4).[2] In reaching that conclusion, he engaged in an expansive interpretation of a series of United States Supreme Court cases, while failing to give effect to court of appeals decisions expressly preserved by the Supreme Court. We find his conclusions not necessitated by those Supreme Court cases and inconsistent with our interpretation of our jurisdictional grant under the Act.

We find no fault with the Administrative Law Judge's findings of fact and credibility resolutions,[3] which we adopt. Our disagreement with the Administrative Law Judge lies in his legal analysis of Supreme Court cases and his interpretation of the Board's commerce jurisdiction over activity related to, but not directly involving, foreign nations.

In this case the ILA brought pressure directly to bear on neutral parties in support of a primary

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[2] On March 16, 1981, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and a supporting brief, and the Respondents filed consolidated exceptions and a brief in support of the exceptions and the Administrative Law Judge's determination.

Pursuant to the provisions of Sec. 3(b) of the Act, the Board has delegated its authority in this proceeding to a three-member panel.

[3] The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

political dispute between it and the government of the USSR. Its actions seriously and adversely affected a variety of American neutral parties. The conduct occurred on American soil and involved American neutral parties. In the Supreme Court's decisions which find implied limitations on the Board's statutory jurisdiction there is nothing to compel the conclusion that Congress intended to deprive the Board of jurisdiction in this case. By contrast, strong policy considerations embedded in the Act weigh heavily in favor of determining the legality of Respondent's conduct in accord with our established standards under the Act.

I.

The essential facts are as follows: On January 9, 1980,[4] 2 weeks after the USSR invaded Afghanistan,[5] Respondent ILA International President Thomas W. Gleason made the following public statement:

> In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian

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[4] All dates are in 1980, unless otherwise indicated.

[5] We take administrative notice that, because of the invasion of Afghanistan by the USSR, President Carter imposed an embargo on exports to the USSR in early January. The President exempted from the embargo the outstanding amount of unshipped grain committed under art. I of the 1975 agreement between the United States and the Soviet Union on the Supply of Grain, 26 U.S.T. 2972; T.I.A.S. No. 8206. The President's statement and directives concerning the embargo issued under the Export Administration Act, 50 U.S.C. App. § 3401, *et seq.*, are contained in the "Weekly Compilation of Presidential Documents," vol. 16, No. 2, Monday, January 14 at pp. 25-27, 32-33.

cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

The reason for this action should be apparent in light of international events that have affected relations between the U.S. and Soviet Union.

However, the decision by the Union was made necessary by the demands of the workers.

It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.

People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs.

The Administrative Law Judge found the boycott decision was instigated, implemented, and enforced by the union leadership despite Respondents' contentions to the contrary. He further found Gleason's statement to be an "order" binding on the rank and file, and that it was so understood by the membership and local union leadership.

The Charging Party, Allied International (Allied), purchases and sells wood products. Allied imports most of its wood from the USSR ($25 million worth in 1979). Allied regularly ships its Russian products

from Leningrad to six American ports, including Boston.

Allied contracts with Waterman Steamship Lines (Waterman), an American corporation, to carry the wood to the United States. Waterman owns three vessels, under United States registry (the *Walton*, the *Middleton*, and the *Jefferson*), which transport the Russian wood. The Boston firm of Peabody & Lane, Inc., is Waterman's ships' agents in the port of Boston. Waterman employs the stevedoring company of John T. Clark & Son (Clark) to unload its ships in Boston. Clark is a member of the Boston Shipping Association. Through the Association, Clark is party to a collective-bargaining agreement with respondents and two other ILA Locals. That agreement contains a union-security clause,[6] and a no-strike clause.[7] Clark obtains its longshoring employees through the union hiring hall as required by the collective-bargaining agreement. The hiring hall maintains 12 permanent gangs to load and unload ships. Each gang has 20 men. The gang members are highly specialized and experienced. Although an incomplete gang may be filled in with some nonunion men (scalawags), a trained, completely nonunion gang could not be hired to unload a vessel. Further, due to their experience on the docks, scalawags refuse to

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[6] Art. 2 of the bargaining agreement provides, in part, "The Employers agree that they will not directly perform any longshoring work done on a pier or terminal, or contract out such work which historically and regularly has been and currently is performed by employees who are members unless the Union is not able or does not supply . . . ."

[7] Art. 40 provides, in part, "[T]he Union agrees that there shall be no strike or work stoppages by the employees."

work ships when the ILA engages in a work stoppage of any kind.

After ILA President Gleason's announcement of the boycott, Allied contacted ILA representatives several times to determine if the ILA would unload Allied's wood in the port of Boston. Each time the Union informed Allied that its position was unchanged and the boycott was firm. When the *Walton* arrived in Boston on January 9 with a cargo of Russian wood, Allied's president, Edward Gildea, and treasurer, Morton Waldfogel, telephoned Gleason to ask him to permit the *Walton* to unload in Boston and its other destined ports. Gleason replied that "he had to draw a line some place" and thus the ILA would unload the *Walton* in Boston, but not at any other American port. After this conversation, Waterman canceled the remainder of the *Walton's* itinerary and discharged its entire cargo in Boston. Due to the boycott, Allied and Waterman diverted the *Middleton* to Montreal to unload its cargo in late January, and directed the *Jefferson* to leave Leningrad without any freight. Finally, as a consequence of the boycott, Allied renegotiated its contract with Russia so as to reduce wood purchases by about $16 million (well over half of its 1979 purchases).

On March 12, after a Federal court enjoined the ILA from boycotting the ports of Savannah and Brunswick, Gildea asked whether the ILA position had changed. Edward Connolly, business agent for Respondent Local 799, replied that any change would be transmitted to him from ILA International Vice President Hankard who would check with ILA President Gleason. On March 25, Allied Vice President Kaires met with Hankard who told Kaires the Union's position had not changed but he would discuss the possibilities of handling Russian cargo in the port

of Boston with Gleason, and "the local stevedores do what they are told to do."

At the time of the hearing in this case the ILA continued to maintain its boycott and Allied remained unable to transport Russian wood directly to the United States.

II.

The Administrative Law Judge dismissed the complaint for want of jurisdiction. He relied on a series of Supreme Court cases[8] which have defined the statutory term "commerce" so as to limit the Board's jurisdiction in situations where the disputed conduct involved and inescapably interfered with the maritime operations of foreign vessels. He therefore found it unnecessary to address the lawfulness of the conduct. This reading of Supreme Court precedent is unduly expansive. We interpret the Supreme Court's decisions as construing "in commerce" to exclude certain activity involving foreign entities. The Court has never barred or indicated its intention to bar jurisdiction over activity between exclusively American entities simply because that activity has some relation to foreign maritime operations. Indeed, such a bar would contradict the clear language of the Act.

The Board is the initial interpreter of the language contained in the NLRA and the Supreme Court has

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[8] *Benz* v. *Compania Naviero Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Incres Steam Ship Co.* v. *International Maritime Workers Union*, 372 U.S. 24 (1963); *International Longshoremen's Local 1416, AFL-CIO* v. *Ariadne Shipping Ltd., et al.*, 397 U.S. 195 (1970); *Windward Shipping (London) Limited, et al.* v. *American Radio Association, AFL-CIO, et al.*, 415 U.S. 104 (1974); and *American Radio Association, AFL-CIO, et al.* v. *Mobile Steamship Association, Inc.*, 419 U.S. 215 (1974).

accorded deference on that basis to the Board's interpretation, *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). In the absence of a clear jurisdictional bar, from the Supreme Court, it would constitute an abdication of our interpretive responsibility to limit our jurisdiction on the basis of the expansive reading of the Court's decisions undertaken by the Administrative Law Judge here.

This is particularly the case when the result would contravene the fundamental congressional intent to formulate a uniform national labor policy not subject to varying and inconsistent state-by-state adjudications. The need for a uniform national policy concerning the ILA's conduct, and conduct similar to it, is unusually compelling. The ILA's actions triggered a national boycott potentially affecting every port in the United States. The ILA can affect the USSR's stance on Afghanistan, if at all, only through an effective nationwide boycott of Russian cargo. A failure to assert jurisdiction would force charging parties into the various state courts, all of which have different injunctive statutes with different standards.[9] Resort to the state courts may well lead to contradictory results, with the ILA being enjoined in some ports and not in others.

Moreover, the peculiar facts here demonstrate the necessity of Federal jurisdiction. The invasion of

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[9] See, e.g., Revised Tex. Stat. Ann., Art. 5154f construed in *Alamo Exp.* v. *International Brotherhood of Teamsters, Local Union No. 657*, 215 S.W.2d 936 (Tex. Civ. App. 1949); Ga. Code Ann., 354-804, 55-108, construed in *Brown Transport, et al.* v. *Truck Drivers and Helpers Local Union No. 728*, 129 S.E. 2d 767 (Ga. Sup. Ct. 1963); N.J. Stat. Ann., § 2A: 15-51, 52, and 53, construed in *Hammer* v. *Local 211, United Textile Workers*, 111 A.2d 308 (N.J. Sup. Ct. 1954).

Afghanistan prompted President Carter to impose an embargo on exports to the USSR in early January.[10] The President exempted certain goods from the embargo in an attempt to establish a uniform national response. Yet, just as the President established limited sanctions against the Soviet Union, the ILA announced its own boycott. Thus, this case presents the novel situation of a labor union establishing a national boycott contravening a Federal policy. The National Labor Relations Board, empowered to enforce the uniform Federal policy embodied in the National Labor Relations Act, which specifically regulates the type of conduct at issue here, is the only forum well suited to deal with this conflict.[11]

Section 10(a) of the Act empowers the Board to prevent "any person from engaging in any *unfair labor practice* (listed in Section 8) *affecting commerce.*" The term "commerce" is defined to include "trade, traffic, commerce, transportation, or communication . . . between any foreign country and any State." [12] Thus, the Act clearly grants jurisdiction over unfair labor practices affecting foreign commerce. The legislative history states unequivocally that "the bill is based squarely on the power of [Congress to regulate] commerce among the several States

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[10] See fn. 5, *supra.*

[11] I Leg. Hist. 1427 (NLRA, 1947) states:

> Only by the operation of a single unifying and coordinating administrative body can the law of Congress be kept true to its intent and receive respectful attention in the courts.

[12] National Labor Relations Act, as amended (61 Stat. 136; 79 Stat. 5196, 88 Stat. 395, 29 U.S.C. § 151, *et seq.*), Sec. 2(6).

and with foreign nations," but does not define commerce jurisdiction with foreign nations.[13]

Although the activity involved here would seem, at first blush, clearly within our jurisdiction, the Supreme Court noted, in *Windward Shipping, Ltd., supra*, that the term "in commerce" is not self-defining. In *Windward*, and several other cases, the Court has identified certain limitations on our jurisdiction over activity that involves foreign maritime operations. The Administrative Law Judge found that this case falls within those limitations and therefore is beyond our jurisdiction. We disagree.

In finding our assertion of jurisdiction appropriate here, we note first that the ILA boycott is quite arguably an example of classic economic pressure on neutral parties prohibited by Section 8(b)(4) of the Act. That the ILA's conduct was directed solely against exclusively neutral and American entities sets it apart from the activities involved in the Supreme Court cases limiting our jurisdiction.

Reduced to its simplest form, this case presents a dispute between the ILA and the USSR. Respondents concede, and no party contests, a primary objective to pressure the Soviet government to halt its aggression against Afghanistan. Beyond cavil, that dispute is not subject to regulation by the Act or any of the Nation's labor laws. That, however, does not end our inquiry.

Although Section 8(b)(4) is commonly described as prohibiting secondary boycotts,[14] its prohibitions

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[13] [II] Leg. Hist. 3057 (NLRA, 1935).

[14] Sec. 8(b)(4)(i) and (ii)(B) states, in relevant part, as follows:

> 8(b) It shall be an unfair labor practice for a labor organization or its agents—
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> * * * * *

do not encompass a primary-secondary dichotomy. Rather, Section 8(b)(4) prohibits certain specified conduct if engaged in with certain specified objectives. The absence of a primary labor dispute does not preclude the invocation of Section 8(b)(4)'s protections.

The Supreme Court made clear in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 644-645 (1967), that if a "boycott were tactically calculated to satisfy union objectives elsewhere [it is secondary, and] there need not be an actual dispute with the boycotted employer . . . for the [dispute] to fall within this category." This principle has been applied by the courts and the Board in a variety of situations where, as here, the union has no primary labor dispute with any employer. For example, in *N.L.R.B.* v. *Washington-Oregon Shingle*

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(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

Weavers' District Council and Everett Local 2580 Shingle Weavers' Union, AFL [*Sound Shingle Co.*], 211 F.2d 149 (9th Cir. 1954), a union ordered employees of an employer not to process shingles into shakes because it had been attempting to organize the Canadian mills that manufacture such shingles. The union admittedly had no dispute with the specific Canadian mill that was processing these shingles. The court stated:

> The Union's argument that there was no evidence of a dispute between it and the Canadian plants is without merit. If that were true, it would not make the Union's conduct any more excusable. The prohibited object of the boycott is stated by the statute to be "forcing . . . any employer or other person to cease using . . . the products of any other producer, processor, or manufacturer . . . ." That is a prohibited object whether the union has or has not a dispute with such "other producer, processor, or manufacturer." *In fact, if the object is sought, not because of any dispute, but merely because the union dislikes the other producer for any reason, or for no reason, the conduct would appear even more reprehensible* . . . . [*Id.* at 152.] [Emphasis supplied.]

Several courts have concurred in the analysis applied in *Shingle Weavers'*.[16] The circuit court decisions rest

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[16] *Soft Drink Workers Union Local 812, IBT* v. *N.L.R.B.*, 105 LRRM 2658, 90 LC ¶ 12,412 (D.C. Cir. 1980); *N.L.R.B.* v. *Twin City Carpenters District Council* [*Pentom, Inc.*], 422 F.2d 309 (8th Cir. 1970); *National Maritime Union of America* v. *N.L.R.B.*, 342 F.2d 538 (2d Cir. 1965), cert. denied 382 U.S. 835; *National Maritime Union of America*,

on a rationale derived directly from the legislative history of the Act that the secondary boycott provision serves dual congressional objectives which may be considered as mutually exclusive: "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of *shielding unoffending* employers and others from pressures in controversies not their own." [16] (Emphasis supplied.)

It is plain from the legislative history that the secondary boycott provisions are to be construed broadly. The House Report stated that one of the characteristics of secondary activities is:

> [T]hat they do not arise out of any dispute between an employer and employees who engage in the activities, or, in most cases, between the employer and any of his employees. More often than not, the employers are powerless to comply with the demands giving rise to the activities, and many times they and their employees do as well are the helpless victims of quarrels that do not concern them at all . . . .[17]

In the same vein Senator Taft stated that the object of Section 8(b)(4) of the Act is to protect "a third

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AFL-CIO v. *N.L.R.B.*, 346 F.2d 411 (D.C. Cir. 1965), cert. denied 382 U.S. 840.

Of the five circuit courts that have considered the issue, only the Fourth Circuit found a primary dispute necessary to the finding of a violation of Sec. 8(b)(4) of the Act. *N.L.R.B.* v. *International Longshoremen's Association and Local 1355, ILA* [*Ocean Shipping Service*], 332 F.2d 992 (4th Cir. 1964).

[16] *N.L.R.B.* v. *Denver Building and Construction Trades Council* [*Gould & Preisner*], 341 U.S. 675, 692 (1951).

[17] II Leg. Hist. (NLRA, 1947).

person who is wholly unconcerned in the disagreement . . . ." [18]

Congress invested the Board with exclusive jurisdiction to determine the legality of such conduct in order to foster a uniform Federal policy in labor relations.[19]

It is difficult to imagine a situation that falls more squarely within the scope of Section 8(b)(4) than the one before us today. Here, the Union's sole dispute is with the USSR over its invasion of Afghanistan. Allied, Waterman, and Clark [20] have nothing to do with this dispute. Yet the Union's actions in furtherance of its disagreement with Soviet foreign policy have brought direct economic pressure on all three parties and have resulted in a substantial cessation of business. Thus, the conduct alleged in this case is precisely the type of conduct Congress intended the National Labor Relations Act to regulate.[21]

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[18] *Id.* at 1106.

[19] I Leg. Hist. 314 (NLRA, 1947).

[20] Pursuant to Sec. 8(b)(4)(i) and (ii)(B), we would find the neutral Employers herein, Allied, Waterman, and Clark, to be "persons" under the Act.

[21] In *Allied International, Inc.* v. *International Longshoremen's Association, AFL-CIO*, 640 F.2d 1368, 1378 (1st Cir. 1980), the court writes:

> The labor laws do not confer upon bargaining representatives a voice in the conduct of [foreign policy. The fact that there has been] few, if any, cases that have applied the secondary boycott provisions to activity motivated by a "purely political dispute" illustrates little more than the rarity with which labor unions have seen fit to engage in this sort of "political strike" conduct. The language of section 8(b)(4) and the congressional objectives that prompted its enactments point to no reason why the section should not prohibit any secondary pressure, for whatever reasons motivated.

Nevertheless, as noted above, the Supreme Court, in a series of decisions broadly applied by the Administrative Law Judge and our dissenting colleague, has created implied limitations on our jurisdiction over activity involving foreign entities. The net effect of this expansive reading of the Court's limitations would be to nullify the jurisdiction of the NLRB in all cases involving a foreign entity. We conclude that the Supreme Court has not so emasculated our jurisdiction, and that assertion of jurisdiction here is fully consistent with the Court's decisions. Further, as noted above, considerations of national policy weigh heavily in favor of assertion of jurisdiction. Under such circumstances, we will not deprive injured, neutral parties of the protection of the Act without the clearest mandate to do so.

The Supreme Court has held that the Board is deprived of jurisdiction over a primary labor dispute between an American union and a foreign entity on the grounds that such assertion of jurisdiction would inescapably interfere with foreign labor relations, foreign trade, and comity among nations. It has also held, for the same reasons, that the Board is deprived of jurisdiction over the secondary effects resulting from primary conduct engaged in by an American union in furtherance of a primary dispute with a foreign entity. The Court has never held, however, that we are necessarily deprived of jurisdiction over *all* secondary conduct engaged in to further a primary dispute which itself is beyond our jurisdiction merely because that dispute is with a foreign entity.

Indeed, the Court expressly has approved our assertion of jurisdiction through Section 8(b)(4) over domestic secondary activity undertaken in furtherance of a primary dispute with a foreign primary

employer. This case involves just such domestic secondary conduct directed at U.S. employers in an attempt to bring pressure on a foreign primary disputant. It is therefore squarely within the jurisdictional parameters set out by the Supreme Court. An analysis of the relevant precedents fully supports this conclusion and demonstrates that the applicable Supreme Court cases are in harmony.

The line of six Supreme Court cases relied on by the Administrative Law Judge stretches back to 1957. The first three of those cases involved claims of Board jurisdiction over primary labor disputes between foreign flag carriers and foreign seamen employed by those carriers.[22] Thus *Benz* involved picketing by an American union to support striking foreign crews employed under foreign articles; *McCulloch* concerned a Board ordered election involving foreign crews of foreign flag ships; and *Incres* involved the picketing of a foreign ship by an American Union in an effort to organize the foreign crew. The Court's expressed concern in those cases focused on Board jurisdiction resulting in interference with foreign maritime operations. Although the Court found no specific congressional prohibition of Board jurisdiction in those cases, it held that the assertion of jurisdiction would directly interfere with the laws governing foreign flag carriers and, in so doing, contravene the principles of comity and international trade. The Court stated:

> For us to run interference in such a delicate field of international relations there must be present

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[22] *Benz* v. *Compania Naviero Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Incres Steam Ship Co.* v. *International Maritime Workers Union*, 372 U.S. 24 (1963).

> the affirmative intention of Congress clearly expressed. [353 U.S. at 147.]

Finding no expression of "affirmative intention" by Congress, the Court denied Board jurisdiction, noting that none of the cases dealt with "industrial strife between American employees and employers" that Congress intended the Act to protect against.

The Court reached a different result, however, when it considered a dispute over the wages paid to American employees by the owners of foreign flag ships. It found that an American union's picketing of a foreign flag vessel protesting substandard wages for longshoring work as an activity "in commerce." *International Longshoremen's Association, Local 1416, AFL-CIO* v. *Ariadne Shipping Co., Ltd.*, 397 U.S. 195 (1970). Although *Ariadne* involved a primary labor dispute with a foreign-flag vessel, the Court noted that the dispute "centered on the wages to be paid American residents, who were employed . . . not to serve as members of its crew but rather to do casual longshore work." *Id.* at 199. It therefore held that assertion of the Board's jurisdiction would not threaten interference in the internal affairs of foreign ships so as to conflict with foreign or international law.[23]

In each case, from *Benz* to *Ariadne*, the Court faced activity directed against foreign interests. In each instance, the critical factor determining the assertion of jurisdiction was the degree of interference in the internal affairs of foreign entities and/or the potential conflict with principles of comity in international maritime trade. Each of these cases involved a

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[23] The Court reached this conclusion despite the fact that the longshoring work was done both by American longshoremen and foreign seamen.

question of Board jurisdiction over primary labor activity undertaken against a foreign carrier and raised no question concerning injury to American neutrals.

Windward Shipping (London) Limited, et al. v. *American Radio Association, AFL-CIO, et al.*, 415 U.S. 104 (1974), like the earlier cases, presented only a question of jurisdiction over primary activity directed against foreign labor relations. There, an American union picketed foreign ships protesting substandard wages paid to their foreign crews. The union's area standards picketing publicized the competitive advantage enjoyed by foreign ships because of the difference between foreign and domestic seamens' wages. The Court noted that the picketing did not involve "the inescapable intrusion into the affairs of foreign ships" that was present in *Benz* and *Incres*, in that there was no attempt to organize foreign crews or to support foreign crews in their own wage dispute with a foreign shipowner. Nevertheless, the Court held that the conduct was controlled by the *Benz* line of cases rather than by *Ariadne*. In so holding, the Court observed that the union must have hoped to force the foreign shipowners to raise their operating costs and that such an increase would have a significant impact on the maritime operations of the ship well beyond wages paid in American ports. The Court stated:

> Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefitting American working men which the LMRA was designed to regulate. [415 U.S. at 115.]

The secondary effects of the very conduct at issue in *Windward* came before the Court in *Mobile*.[24] There, American stevedoring companies seeking to service the picketed foreign ships and American shippers wishing to load their cargos on the ships sought to enjoin the identical picketing. These parties argued that *Windward* held only that the maritime operation of foreign ships were not "in commerce." They contended that a different result was required when the picketing was viewed in the context of its effect on American employers, who were themselves clearly "in commerce." The Court rejected this argument because it required a "bifurcated view of the effects of a single group of pickets at a single site." The Court found that the response of the American stevedores was a:

> . . . crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected. . . . *The effect of the picketing on the operations of the stevedores and shippers . . . is precisely the same whether it be complained of by the foreign-ship owners or by persons seeking to service and deal with the ships.* The fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into "commerce" activities which plainly were not such in *Windward.* [*Emphasis supplied.*][25]

Thus, the finding that *Mobile* picketing was not "in commerce" rested upon the *primary* nature of the activity; i.e. the attempt to directly pressure foreign shipowners to raise the wages of their seamen

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[24] 419 U.S. 215 (1974).

[25] *Mobile*, 419 U.S. at 224-225.

to the level of domestic wages, and the necessary effect of this primary activity on foreign maritime operations.[26] In so holding, the Court noted that it need cast no doubt on those cases finding that the Board has jurisdiction under Section 8(b)(4) of *domestic* secondary activities which *are* "in commerce" even though the primary employer and the locus of the primary dispute is outside the United States.[27] In effect, the combined *Windward* and *Mobile* holdings are that primary conduct which interferes with foreign maritime operations is not subject to the Board's jurisdiction, regardless of whether the charging party is a primary or secondary employer.

The Administrative Law Judge ignored the critical fact that the Court analyzed the secondary effect of the *Mobile* picketing solely on the basis of its identity with the primary conduct held to be beyond the Board's jurisdiction in *Windward*. Instead, he found that *Windward* represented a departure from the *Benz* mode of analysis. He felt the Court now would utilize two tests to determine whether Board jurisdiction would intrude into international maritime relations: the objective of the Union and the predictable

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[26] In both *Windward* and *Mobile* plaintiffs sought to enjoin primary conduct which, had Board jurisdiction been asserted, might well have been immunized from the prohibitions of Sec. 8(b)(4) by the primary conduct proviso to that section.

[27] The court specifically approved of the holdings in *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418 AFL-CIO* [*Continental Grain Company*] v. *N.L.R.B.*, 376 F.2d 774 (D.C. Cir. 1967); and *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418 AFL-CIO* [*Continental Grain Company*], 334 F.2d 1014 (7th Cir. 1964). Those cases recognize the Board jurisdiction over domestic secondary activity undertaken in furtherance of a primary labor dispute involving foreign employees of a foreign employer.

impact of its conduct. The tests would operate "to remove from Board jurisdiction the regulation of conduct which promised a substantial adverse economic effect upon foreign trade." (ALJD, p. 17, ll. 13-16.) The Administrative Law Judge also viewed *Mobile* as focusing on the economic impact on foreign trade rather than the relationship between primary and secondary activity. He relied on the following:

> Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioner's picketing did not even "arguably" violate § 8(b)(4)(B) of that Act. [*Mobile*, 419 U.S. at 228.]

From this perspective, the Administrative Law Judge found the ILA's conduct "threatened the sort of ramifying consequences, affecting the Russian economy, without countervailing and limited benefit to domestic workers, to which *Windward* referred." (ALJD, p. 36, ll. 31-36).[28]

This is clearly a misreading of *Windward* and *Mobile*. In *Mobile*, the Court stressed the inextricable intertwining of the primary and secondary effects of the same primary conduct. It found the same interference with foreign maritime operations in both instances. Thus, in *Mobile* the Court found the Board could not assert jurisdiction over primary con-

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[28] The language used and the analysis engaged in by the Administrative Law Judge closely tracks that of the Fifth Circuit in *Baldovin* v. *International Longshoremen's Association*, 626 F.2d 445 (1980), discussed *infra*.

duct (terms and conditions of foreign seamen on foreign vessels) that was not "in commerce," regardless of who sought jurisdiction.

The Administrative Law Judge's reading of *Mobile*[29] is inconsistent with his inability to explain the Court's approval of the *Grain Workers* cases.[30] However, a correct understanding of *Mobile* demonstrates its harmony with those cases.

The *Grain Workers* cases arose from a primary dispute between a Canadian union and a Canadian shipping company concerning working conditions of Canadian employees. This primary dispute was inarguably beyond the Board's jurisdiction. However, when the foreign union's domestic affiliate sought to support that dispute by a work stoppage "directed against an American employer . . . and involving employees working in a domestic plant of the American employer," that *secondary* conduct was subject to the Board's jurisdiction. (*Grain Elevator*, 334 F.2d at 1019.) Because of the purely secondary and domestic nature of the conduct, application of the NLRA did not result in an attempt to regulate the internal management of affairs of the Canadian ships.

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[29] In the same manner, the Administrative Law Judge has misinterpreted our decision in *National Maritime Union of America (Shippers Stevedoring Company)*, 245 NLRB 149 (1979). There, the picketing activity was directed immediately against the foreign flag ship with the intent of compelling the total replacement of the foreign ship and its foreign crew with an American ship and its American crew. This case falls squarely into the Court's limitation in *Windward/Mobile*: the dispute *directly* intruded into the maritime operations of a foreign ship.

[30] See fn. 27, *supra*.

The present ILA case is distinguished from *Windward* and *Mobile* on exactly the same basis. The alleged conduct is purely secondary and there is no risk that assertion of Board jurisdiction will directly intrude into the maritime operations of a foreign ship. The only interpretation that should be given to the Court's decisions in *Windward* and *Mobile* is that clearly indicated by them. Those cases hold only that, where primary activity interferes with foreign maritime relations and inextricably involves the secondary employers, the Board is prohibited from asserting jurisdiction over the primary conduct or its secondary effects. There is thus no bar to our assertion of jurisdiction.

This interpretation of the Supreme Court's teaching is consistent with the result reached by the First Circuit in *Allied International, Inc., supra*, 640 F.2d 1368 (1981). *Allied* presented the same facts under consideration here. The court pointed out that it did not face the situation the Supreme Court addressed in *Windward* and *Mobile* where American unions or employers were only peripherally involved in the dispute. To the contrary, the dispute at issue was solely American. It stated: "[t]he *only* labor-related activity in issue has been played out by an all-American cast." (640 F.2d at 1374)." It also stated:

> Allied, Waterman and Clark are American companies and the ILA is an American union. All engage regularly in business affecting the transportation of goods among the several states. Indeed, the instant dispute arose when the ILA's actions allegedly impeded Allied's ability to move its wood products from Boston to other ports along the East Coast, and Allied contends that

> the ILA continues to frustrate its ability to transport its goods into this country. [640 F.2d at 1371.]

The *Allied* court went on to conclude "[t]he fact that this domestic labor dispute was inspired by military events in foreign lands—events far beyond NLRB jurisdiction—does not counsel against application for the NLRA to the labor dispute ongoing here at home. In sum, none of the considerations that prompted the Court in cases such as *Windward, Incres,* and *Benz* to find the Act inapplicable have force in this context. We hold, therefore, that section 8(b)(4) applies . . . ." [640 F.2d at 1374.]

The court addressed the distinction between this case and *Windward/Mobile.* Here, purely American secondary employers are objecting to purely secondary conduct subject to Section 8(b)(4), whereas in *Mobile* secondary employers were objecting to primary activity not subject to our jurisdiction. In fact as the court notes, contrary to *Mobile,* the primary dispute is "far beyond NLRB jurisdiction."

Contrary to the finding of the Administrative Law Judge, the Board's assertion of jurisdiction in *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.),* 146 NLRB 723 (1962), is also in harmony with the Supreme Court's rulings in *Windward* and *Mobile.*[31] That case in-

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[31] The Administrative Law Judge found the Board's decision in *Ocean Shipping* not binding on him:

> The same staleness consideration applies to the Board's assertion of jurisdiction in one of the *Grain Workers* cases, decided in 1965. [ALJD at fn 25.]

The Administrative Law Judge neglected to note that *Grain Workers* was upheld by the circuit court and was the basis for fn. 10 in *Mobile.*

volved another ILA boycott, undertaken during the 1962 Cuban missile crisis. The ILA refused to load ships engaged in Cuban trade. As here, there was neither picketing nor any other interference with ship operations. The Board found the ILA's domestic secondary conduct was subject to its jurisdiction and violative of Section 8(b)(4).

The Administrative Law Judge and, inferentially, our dissenting colleague have rejected this analysis of *Allied* and *Ocean Shipping*, choosing instead to embrace the contrary reasoning of the Fifth Circuit in *Baldovin* v. *International Longshoremen's Association, AFL-CIO*, 626 F.2d 445 (1980). That case arose from the same ILA boycott involved here and presented a like fact pattern. The Fifth Circuit found that the Supreme Court's decision in *Mobile* deprived us of jurisdiction. The court wrote:

> [T]he secondary boycott prohibition was designed to narrow the labor controversy into a confrontation between the primary opponents . . . if the objective of the union is to obtain concessions of a kind that could not be achieved either by domestic action or by labor disputes of the kind encompassed by the NLRA, the boycott ban would be merely a prohibition devoid of its functions. [*Id.* 626 F.2d at 450.]

On this basis the court held (at 452):

> While the ILA refusal to work has affected American farmers who produce the grain, American transportation companies who move it to ports and the American stevedores who load it aboard vessels, it is patent that this was an incidental effect and not the objective. As the *Mobile* case holds, a bifurcated view of such "commerce" is not permitted as regards the

> American farmers and stevedores who are incidentally affected by the ILA's politically-inspired work stoppage. The effect of the ILA action on the business of these American entities provides no "basis for Board *statutory* authority . . . . [419 U.S. at 226]" [Emphasis supplied.]

We disagree with this rationale in at least three respects.

First, the court's language that the prohibition on secondary boycotts "was designed to narrow the labor controversy into a confrontation between primary opponents" is contrary to the language of Section 8(b)(4) and the overwhelming weight of existing precedent. As discussed above, the absence of a primary dispute does not preclude the invocation of 8(b)(4) protections. As we have previously noted, the Supreme Court has stated that "[t]here need not be an actual dispute with the boycotted employer" for there to be a boycott which is secondary in its aim and therefore prohibited.[32]

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[32] *National Woodwork Mfgrs. Assn.*, 386 U.S. at 645, see discussion at p. 6-8, *supra*. Moreover, in a tandem decision to *Baldovin*, *New Orleans Steamship Association* v. *General Longshore Workers, ILA Local Union No. 1418* [*Jacksonville Bulk Terminals*], 626 F.2d 455 (5th Cir. 1980), the court held that the ILA boycott which is a strike to further the political goals of the union does "involve or grow out of any labor dispute" for purpose of the Norris-LaGuardia Act. Because the definition of "labor dispute" is the same under the National Labor Relations Act and Norris-LaGuardia Act, the court, in attempting to harmonize *Baldovin* and *Jacksonville Bulk*, stated at fn. 9 in *Jacksonville Bulk* that, although this is a labor dispute, it is not "in commerce" for the purpose of Sec. 8(b)(4) of the Act. Yet, in *Baldovin*, as discussed *supra*, the court went to great lengths to explain the boycott was not "in commerce" precisely because there is no primary labor dispute.

Second, the *Baldovin* court interprets the Supreme Court's decision in *Mobile* in a manner which conflicts with the *National Woodwork* decision. As noted above, *Mobile* holds that primary conduct not subject to the Board's jurisdiction, and therefore not subject to being enjoined at the behest of the primary employer, is not made subject to that jurisdiction by virtue of its secondary effects. Unlike the *Baldovin* court, however, we do not interpret *Mobile* to hold that the purely secondary conduct in this case is not subject to the Board's jurisdiction.

Finally, the Fifth Circuit stated that the impact of the respondent's activities on the American neutrals is "an incidental effect and not the objective." As discussed *infra*, the Supreme Court's precedents make clear that the necessary and foreseeable consequences of a union's activity are every bit as much its object within the meaning of Section 8(b)(4) as are its stated objectives.[33]

The ILA has engaged in conduct classically subject to regulation under Section 8(b)(4). This conduct involved actions by American employees working for American employers and caused serious injury to neutral parties. Assertion of jurisdiction over this purely domestic secondary conduct does not involve us in regulation of the primary dispute between the ILA and the USSR; it poses no interference with foreign maritime operations; it furthers the legislative purpose in enacting Section 8(b)(4); and it is consistent with the Supreme Court's teachings. Therefore, we determine the legality of the ILA's boycott under the Act.

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[33] See discussion *infra* at pp. 30-34.

III.

Section 8(b)(4) shields "unoffending employers and others from pressures in controversies not their own." [34] It bars a union from either inducing employees to refuse to handle goods or from threatening or coercing any person with an object of forcing any person to cease doing business with a third person. The ILA boycott of Russian cargo is a classic example of the inducement and coercion forbidden by Section 8(b)(4). Respondents concede their sole dispute is with the USSR over its military policy in Afghanistan.[35] Allied, Waterman, and Clark clearly have no part in this controversy. Beyond question, they are neutral employers. Yet it is undisputed that Respondents' refusal to handle Russian cargo has caused substantial disruption of their business operations resulting in significant economic harm to them. Respondents' admissions alone therefore suggest their conduct is within the scope of Section 8(b)(4)(i) and (ii)(B). Examination of their defenses compels the finding of a violation.

First, Respondents assert that they did not induce their members to boycott Russian goods. Instead, they argue that ILA President Gleason's January 9 public statement ordering the immediate suspension in handling all Russian ships and cargo was merely a "response to overwhelming demands by the rank and file and was responsive to their urgings for a uniform policy." The facts in this case are over-

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[34] *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 692 (1951).

[35] As seen in sec. II, *supra*, the absence of a primary labor dispute cognizable under the Act does not preclude the application of Sec. 8(b)(4) to the events in question in this case.

whelmingly to the contrary, and establish conclusively that Gleason's January 9 statement was a binding order from the president of the ILA to the rank-and-file membership.[36] The Administrative Law Judge so found, and we agree.

The orchestration of the boycott by the International's leadership is evident in conversations between Allied officials and representatives of the Local Unions, discussed in section I,[37] which indicated that any change in the boycott of Russian cargo would originate with ILA President Gleason.

Further, on the morning of January 9, prior to the public release of Gleason's statement, ILA longshoremen employed by Clark to unload the Waterman ship, *Walton*, discovered that Allied's wood cargo had originated in the USSR. They were "very disturbed" about handling that cargo, and *wanted* to leave the *Walton* immediately. Notwithstanding these express wishes of the rank and file to stop working on cargo from the USSR, Hankard told the longshoremen to continue working until he found out from ILA headquarters in New York "what was happening." None of the ILA rank and file in Boston actually stopped handling Russian cargo until ordered to do so by Gleason.

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[36] Thus, Respondents characterize the reading of Gleason's January 9 statement at hiring hall shapeups as the statement being "put to the membership," which was "enthusiastic," "extremely happy," and "in full accord with the position taken in the statement." However, ILA Vice President William Hankard testified that none of the locals even had a *vote* on the question of the Russian boycott. Hankard further testified that the matter of the Russian boycott had never even been brought up for discussion at his own local, of which he is president.

[37] See p. 3, *supra*.

This uncontroverted evidence demonstrates that the decision to boycott Russian cargo was made by ILA leadership and was maintained in effect as a matter of ILA policy determined at the headquarters level. Accordingly, we conclude that Respondents engaged in, and induced and encouraged ILA members employed by Clark to engage in, a refusal in the course of their employment in Boston to handle Allied's wood products emanating from the USSR.

Second, Respondents argue that their only object in refusing to handle Russian cargo was to demonstrate their disapproval of Soviet foreign policy and their unwillingness to contribute in any way to the Soviet cause. They maintain that any cessation in the handling of Russian cargo, or in the purchase or shipment of Russian goods by the business entities here involved was not "an object," but, rather, the unintended effect of withholding their services in demonstration of their disapproval of the invasion of Afghanistan.[38] This argument is wholly without merit. Regardless of whether Respondents *intention-*

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[38] Respondents assert the additional defense that this demonstration of their disapproval of Soviet aggression is protected by the first amendment as an expression of individual conscience. This contention is easily defeated. The ILA boycott is not merely the expression of conscience by individuals. As discussed above, it is a concerted action which predictably encouraged others to cease doing business with neutral, secondary persons. The application of Sec. 8(b)(4) to such conduct imposes no impermissible restrictions upon constitutionally protected speech. *N.L.R.B.* v. *Retail Store Employees Union, Local 1001, Retail Clerks International Association, AFL-CIO* [*Safeco Title Insurance Co.*], 447 U.S. 607, 616 (1980), discussed further, *infra*. See also *Allied International, Inc.* v. *International Longshoremen's Association, AFL-CIO, et al.*, 640 F.2d 1368 (1st Cir. 1981).

ally calculated a total cessation in the handling of Russian cargo at east coast and gulf ports, with an attendant cessation of business among the commercial entities in this case, such an outcome was the foreseeable and inevitable consequence of their actions, and, as such, constitutes an unlawful object.

The Supreme Court has long recognized the difficulty of assessing the object of conduct under Section 8(b)(4), noting that the Board and the Courts have "attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause." [39] Accordingly, the Court has held that a respondent's intent or purpose may be shown by the nature of its conduct.[40] The Court recently applied this mode of analysis in *N.L.R.B.* v. *Retail Store Employees Union, Local 1001* [*Safeco Title Insurance Co.*], *supra*. There, contract negotiations between Safeco and the union representing some of its employees reached an impasse and the employees went on strike. The union picketed not only at Safeco's offices but also at five local county title insurance companies which derived over 90 percent of their respective gross incomes from the sale of Safeco's insurance. The pickets carried signs declaring that Safeco had no contract with the union, and distributed handbills asking customers to support the strike by canceling their Safeco policies. This conduct was alleged to violate Section 8(b)(4).

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[39] *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO* [*General Electric Company*] v. *N.L.R.B.*, 366 U.S. 667, 674 (1961).

[40] *Id.*, referring to *Seafarers International Union of North America, Atlantic & Gulf District, Harbor and Inland Waterways Division* [*Salt Water Dome Production Co.*] v. *N.L.R.B.*, 265 F.2d 585, 591 (D.C. Cir. 1959).

Quoting the Board's Safeco decision,[41] the Court stated: "[T]he Union's secondary appeal against the central product sold by the title companies in this case is 'reasonably calculated to induce customers not to patronize the neutrals at all.' " [42] The Court found that the union was responsible for the foreseeable consequences of its conduct and held that product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss is contrary to the language and purpose of Section 8(b)(4)(ii)(B) of the Act.

The holding of *Safeco* applies with full force to this case. Approximately 85 percent of Allied's imported products, amounting to $25 million annually, come from the USSR. The boycott of Russian cargo inevitably could be expected to threaten Allied with substantial economic loss.

It was equally foreseeable that no longshoremen could be employed by the neutral parties in the face of the ILA boycott. Clark regularly depends on the hiring halls operated by the ILA Locals to furnish the longshoremen who constitute its regular work force. Indeed, the relevant collective-bargaining agreements obligate the stevedoring companies to rely on these hiring halls for *all* of their longshore employees, and permit the companies to seek labor from other sources only if the ILA cannot supply the labor or does not want to work the ship.

While the collective-bargaining agreements may have permitted the use of non-ILA employees, it was entirely predictable that such employees would not be available during the ILA boycott. Thus, ILA

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[41] 226 NLRB 754 (1976).

[42] 447 U.S. at 614.

Vice President Hankard testified that in 39 years of experience he had never seen a ship unloaded entirely by "scalawags." He further testified that when the ILA goes on strike against a ship, scalawags do not substitute for striking ILA longshoremen. In his words, "The Ship wouldn't be working."

In these circumstances, the inevitable consequences of the ILA boycott, which Respondents had every reason to foresee with absolute clarity, were that Russian goods would not be moved by any employees in any of the ports encompassed by the boycott, that Waterman would cease carrying Russian cargo to the boycotted ports, and that Allied would be forced to cease purchasing Russian wood for delivery to ports affected by the boycott.[43] Under the rationale of *Safeco*, Respondents must be held accountable for the foreseeable consequences of their conduct, and, regardless of their stated intent, must be held to have induced the boycott with an object of forcing the business entities involved to cease business operations among themselves and to cease handling goods of the

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[43] We find it unnecessary to our determination that Respondents have violated Sec. 8(b)(4) of the Act to pass upon the question of whether the USSR is a person, within the meaning of that section, as defined by Sec. 2(1) of the Act. Clark, Waterman, and Allied are clearly persons within that definition. The ILA induced and encouraged its members to refuse to handle goods and it coerced Clark, Waterman, and Allied. The object of this inducement, encouragement, and coercion was to force each of the neutrals to cease handling goods emanating from Russia and to require Clark, Waterman, and Allied to cease doing business with each other. See *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418* v. *N.L.R.B.*, 376 F.2d 774 (D.C. Cir. 1967), and *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418*, 334 F.2d 1014 (7th Cir. 1964).

USSR.[44] By the same reasoning, Respondents must be found to have coerced and restrained these neutral parties with an object of causing them to cease doing business with each other as well as with the USSR. This result is particularly required here, where Respondents' conduct is exclusively secondary. Thus, while Respondents' primary dispute is with the USSR, none of their activity was undertaken directly against the USSR. Instead, Respondents attempted to pressure the USSR through those parties doing business with it—the very tactic Section 8(b)(4) was enacted to prohibit.[45]

A similar rationale was applied to these same facts by the First Circuit ruling in *Allied International, Inc.*, discussed above in section II. There the court stated that:

> [T]he ILA has chosen to carry out its goal of protest through action—a selective work stoppage—which by its very nature is designed to force at least partial cessation of business between companies with which the ILA has no labor-related grievance. While the ILA boycott may be a heartfelt act of protest against conduct

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[44] See also *N.L.R.B.* v. *Local 825, International Union of Operating Engineers AFL-CIO* [*Burns and Roe, Inc.*], 400 U.S. 297, 304-305 (1971); *N.L.R.B.* v. *Denver Building and Construction Trades Council, et al.* [*Gould and Preisner*], 341 U.S. 675 (1951); see, generally, *Radio Officers' Union of Commercial Telegraphers Union, AFL* [*A. H. Bull Steamship Company*] v. *N.L.R.B.*, 347 U.S. 17, 45 (1954).

[45] Nor can Respondents be heard to argue that they have no other means of furthering their primary dispute than by embroiling neutral employers in it. Respondents could, for example, have picketed the Russian embassy and Russian consular offices in various cities throughout the United States.

that the ILA leadership and many ILA members find "repugnant," we cannot accept the proposition that this negates a finding that the "objective" of the boycott is one proscribed by section 8(b)(4). Nor do we think that this section was meant to permit any and all union actions designed to keep union members from "doing unconscionable work" or to protect their "moral integrity, spiritual welfare, and political convictions. [640 F.2d at 1375.]

* * * * *

We think that the object of a boycott, for purposes of section 8(b)(4)(ii)(B), can be inferred from the virtually inevitable results generated by it, at least when, as here, the union's conduct can under no reading of the facts be characterized as "primary activity" protected by the Act. [640 F.2d at 1375-76, citing *Safeco, supra.*]

The Board also used this rationale to find a violation of Section 8(b)(4)(ii)(B) in virtually identical circumstances. In *Ocean Shipping, supra,* the ILA issued a press release announcing that it would not handle cargo in ships of any owner whose vessels were used in trade with Cuba, with whom the ILA had a nonlabor dispute. Thereafter, the ILA issued specific instructions to its membership that if any specified ships arrived at any ILA port, ILA members were "forbidden to handle them." In Baltimore, the ILA repeatedly refused to work on a particular ship because it had engaged in Cuban trade.

The Board found that the ILA had violated Section 8(b)(4)(ii)(B) of the Act, because the ILA's refusal to refer work gangs to the neutral ship fitting company involved had the effect of denying the ship

fitter its customary work force.[46] Under the circumstances, the Board found that, whatever the ILA's *ultimate* object may have been in terms of eliminating trade with Cuba, certainly "an object" of the ILA's conduct was to force or require the cessation of business between the ship fitting company and the ship's owner.

Based on the above, we find that, within the meaning of Section 8(b)(4), Respondents have engaged in, and induced and encouraged their members to engage in, refusals in the course of their employment by Clark to process or otherwise handle Soviet cargoes which are owned by Allied and destined for Boston and other ports on the Atlantic Ocean and Gulf of Mexico. In addition, Respondents have threatened, coerced, and restrained Clark, Waterman, and Allied with a refusal to refer Respondents' members for unloading cargo emanating from the USSR. The objects of Respondents' above-described conduct were (1) to force or require Clark to cease doing business with Waterman and Allied, (2) to force or require Waterman to cease doing business with Allied, and (3) to force or require Clark, Waterman, and Allied to cease using, selling, handling, transporting, or otherwise dealing in the products of the USSR, each in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

The decisions of the Supreme Court, the First Circuit Court of Appeals, and the Board mandate a conclusion that we assert jurisdiction in this case and find the ILA has engaged in conduct inarguably vio-

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[46] The Board in *Ocean Shipping* expressly found no merit in the ILA's argument that the neutral ship fitting company could draw labor from other sources to work on the struck ship.

lative of Section 8(b)(4) of the Act. The Board's assertion of jurisdiction is compelled if the clear language of the Act placing foreign commerce within our jurisdiction is to have any meaning. Nothing in the Supreme Court's decisions finding implied limitations on our foreign commerce jurisdiction suggests that the Board is deprived of jurisdiction where American neutral employers are directly and adversely affected by purely secondary conduct violative of Section 8(b)(4) merely because a foreign nation is involved in the dispute. Finally, Respondents' defenses to the alleged violation of Section 8(b)(4) pale in the face of overwhelming evidence that the decision to boycott Russian cargo was orchestrated and choreographed by the ILA leadership who knew that the cessation of business among Allied, Waterman, and Clark was a foreseeable and inevitable consequences of their actions and, in fact, a desired effect. Respondents here engaged in exclusively secondary conduct—precisely the type of conduct Section 8(b)(4) prohibits.

IV.

Having found that Respondents have engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action deemed necessary to effectuate the policies of the Act.

Conclusions of Law

1. Allied International, Inc., Waterman Steamship Lines, and John T. Clark and Son of Boston, Inc., and each of them are employers engaged in commerce and in operations affecting commerce within the meaing of Section 2(2), (6), and (7) of the Act.

2. International Longshoremen's Association, AFL-CIO, and Local 799, International Longshoremen's Association, AFL-CIO, collectively referred to here as Respondents, and each of them, are labor organizations within the meaning of Section 2(5) of the Act.

3. By inducing and encouraging employees of Clark, members of the Respondents, not to handle and unload goods owned by Allied and transported by Waterman, and by coercing and restraining Allied, Waterman, and Clark, with an object of forcing or requiring Allied, Waterman, and Clark to cease doing business with each other, the Respondents engaged in unfair labor practices affecting commerce in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, International Longshoremen's Association, AFL-CIO, and Local 799, International Longshoremen's Association, AFL-CIO, individually and collectively, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging individuals employed by Clark, or any other persons engaged in commerce, to engage in a strike or refusal in the course of their employment to process, transport, load, unload, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services.

(b) Threatening, coercing, or restraining Allied, Waterman, and Clark, or any other persons engaged

in commerce or in an industry affecting commerce, where an object thereof is to require the above-named persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to force Allied, Waterman, and Clark to cease doing business with each other.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[47] Copies of said notice, on forms provided by the Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to their members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Promptly after receipt of copies of said notice from said Regional Director, return the signed copies for posting by Allied, Waterman, and Clark, those companies willing, at all places where notices to their respective employees are customarily posted.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order,

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[47] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C. August 28, 1981

JOHN H. FANNING, Member

DON A. ZIMMERMAN, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER JENKINS, dissenting:

The Administrative Law Judge gave a careful, scholarly, and accurate analysis of the cases, including the controlling Supreme Court decisions. His dismissal of the complaint is correct, for the reasons he stated, and I would affirm him.

Dated, Washington, D.C. August 28, 1981

HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT induce or encourage individuals employed by John T. Clark & Son of Boston, Inc., or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or refusal in the course of their employment to process, transport, load, unload, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services.

WE WILL NOT threaten, coerce, or restrain Allied International, Inc., Waterman Steamship Lines, or John T. Clark & Son of Boston, Inc., or any other persons engaged in commerce, or in an industry affecting commerce, where the object thereof is to require the above-named persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to force Allied International, Inc., Waterman Steamship Lines, and John T. Clark & Son of Boston, Inc., to cease doing business with each other.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

(Labor Organization)

Dated ———— By ————————————
(Representative) (Title)

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

(Labor Organization)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617—223-3313.

JD-100-81
Boston, MA

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 1-CC-1753

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO

and

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO

and

ALLIED INTERNATIONAL, INC.

John S. May, Esq., of Boston, MA, and *Joseph E. Mayer, Esq.*, of Washington, D.C. for the General Counsel.

Duane R. Batista, Esq. (*Nutter, McClennen & Fish*), Boston, MA, for the Charging Party.

Herzl S. Eisenstadt, Esq. (Law Offices of *Thomas W. Gleason*), New York, NY, and *Joseph T. Doyle, Esq.*, of Boston, MA, for the Respondents.

DECISION

BERNARD RIES, Administrative Law Judge: This matter was heard in Boston, Massachusetts, on August 27-28, 1980. It has two companion cases: *International Longshoremen's Association, AFL-CIO, et al.* (*Occidental Chemical Company*), Cases Nos. 10-CC-1141-1, -2, -3 and -4, and *International Longshoremen's Association, AFL-CIO, et al.* (*Kansas*

Farm Bureau, American Farm Bureau Federation, Texas Farm Bureau), Cases Nos. 23-CC-762-1, -2, -3, -4, 23-CC-763-1, -2, -3, -4, and 23-CC-764-1, -2, -3, and -4, which were heard by the undersigned, respectively, on September 4-5, 1980, in Savannah, Georgia, and on October 27-28, 1980, in Houston, Texas.

The complaints in the three cases have a common theme—that Respondent International and various of its locals violated Section 8(b)(4)(i)(ii)(B) of the Act by announcing and implementing a boycott of Russian ships and cargo in the early part of 1980. Separate hearings were conducted, however, with the Charging Parties in each case confining their participation to the proceeding to which their charges had given rise. No motion having been made that the cases be consolidated for purposes of decision,[1] and since each of the Charging Parties has played a role in only the case of particular interest to it, I shall issue separate decisions in each case. Because of the commonality of many facts and issues in the three cases, reference will be made occasionally to arguments and circumstances in cases other than the present one.

Briefs were received from the parties in all three cases on or about January 9, 1981. On the basis of the record made at the hearing,[2] my recollection of the demeanor of the witnesses, and the briefs, I make

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[1] Prior to the hearings, Respondents had moved that the three complaints be consolidated for hearing. Oppositions filed by the General Counsel and all the Charging Parties led the Association Chief Administrative Law Judge to deny the motion.

[2] The transcript of proceedings is hereby corrected as follows: at p. 9, l. 6, change "it's" to "as;" at p. 47, l. 23, change "we've" to "I've not;" at p. 218, l. 17, change "not" to "know;" at p. 229, l. 23, change "is not" to "not."

the following findings of fact, conclusions of law, and recommendation.

I. The Issues

On January 9, 1980,[3] two weeks after the invasion of Afghanistan by the Union of Soviet Socialist Republics, Respondent International President Thomas W. Gleason made the following public statement:

> In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.
>
> This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.
>
> The reason for this action should be apparent in light of international events that have affected relations between the U.S. and Soviet Union.
>
> However, the decision by the Union was made necessary by the demands of the workers.
>
> It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.
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> People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs.

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[3] All dates hereafter refer to 1980.

The present complaint alleges that on or about January 9, President Gleason informed Charging Party Allied by telephone that the International would not unload the cargo of a ship carrying Russian goods at any United States port other than the port of Boston. It further alleges that on or about March 12, Respondent Local 799, through its agent Edward Connolly, informed Allied that it would not unload any cargo arriving from the USSR and that until further notice to the contrary was received from Respondent International, the Russian boycott would continue. It is further alleged that on or about March 25, Respondent International, by agents William Hankard and William McNamara, informed Allied that it would not unload any of Allied's cargoes originating in the USSR and that the boycott of such goods would continue until further notice from Respondent International. The conclusion of the complaint is that by the foregoing conduct, the Respondents have induced and encouraged individuals employed by or to be employed by various secondary employers to engage in strikes or refusals to handle goods or commodities and have thereby threatened, coerced, and restrained various secondary employers with an object of forcing the secondary employers to cease handling the products of, or doing business with, the Charging Party and other persons, and of forcing the Charging Party and other employers to cease doing business with the USSR, or with other persons, all in violation of Section 8(b)(4)(i)(ii)(B) of the Act.[4]

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[4] The cited provisions state, in relevant part:

It shall be an unfair labor practice for a labor organization or its agents— . . . (4) (i) to engage in, or to induce or encourage any individual employed by any person en-

II. Findings of Fact

Charging Party Allied International engages in the importation and sale of wood products. Most of the wood imported by Allied is from the USSR; in 1979, Allied purchased Russian wood valued at some 25 million dollars. The principal port of embarkation for the shipment of Russian wood is Leningrad, and the wood is regularly transported from that location to six American ports, including Boston.

Allied contracts with Waterman Steamship Lines, a New York corporation, to perform the carriage of Russian wood to the United States. Waterman employs three vessels of United States registry, the Walton, the Middleton, and the Jefferson, to transport the Russian wood to America; these three ships spend about three-fourths of their working life carrying goods from Russia to the United States.

Waterman contracts with the Boston firm of Peabody & Lane, Inc., as the ship's agent for its vessels in that port. The stevedoring company employed by Waterman to unload ships in Boston is John T. Clark

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gaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ..

& Son of Boston, Inc. Clark is a member of the Boston Shipping Association, an employer organization which represents the four stevedoring companies in the port of Boston and which is party to a collective-bargaining agreement with Respondent International, Respondent Local 799, and two other ILA locals.

The bargaining agreement makes provision for the establishment of a hiring hall from which Clark obtains its longshore employees. The hiring hall has organized 12 permanent gangs used to load and unload ships, each gang consisting of 20 men. When a gang is incomplete, other individuals may be called to fill in the vancancies. According to John Murphy, an official of the Boston Shipping Association, in the course of a month, perhaps five fill-in employees per day are required. Some of the employees so used are nonunion employees ("scalawags"). While Murphy testified that he has seen as many as 25 nonunion employees present in the hall at one time, he has never heard of an entire gang composed of nonunion individuals. William Hankard, an international vice president of Respondent, also testified that in his 39 years of experience, he has never seen a ship unloaded by an entirely nonunion gang. Murphy testified that certain of the jobs, such as operation of the sling and the winch, are "very specialized" and require experience; Hankard said that while he has seen nonunion employees operating such equipment as forklifts and automobiles, he has not witnessed them operating other kinds of equipment on the docks.[5]

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[5] Article 18 of the bargaining agreement provides, in part, "Extra-dock labor may be utilized to fill-out incomplete gangs working at that terminal and/or pier when no additional men required by the Employer are available at the Hiring Hall."

On January 9, the day on which President Gleason issued his public statement, the Walton arrived in Boston and began discharging a portion of its cargo of Russian wood.[6] Reacting to Gleason's announcement, Edward Gildea, president of Allied, and Morton Waldfogel, Allied's treasurer, placed a telephone call to Gleason to ask him if he would permit the Walton to finish unloading in Boston and then to complete its schedule at the other three ports. Both Gildea and Waldfogel testified, without contradiction, that Gleason said that "he had to draw a line some place" and that while the Boston unloading would be completed, the Walton could be discharged at no other port.[7] The following day, Waterman cancelled the Walton's visit to the other three ports and, instead, discharged the remaining wood in Boston.

Due to the apprehension of Allied and Waterman that longshoremen would not unload Russian wood in any American ports, the Middleton, which was to arrive with a shipment of wood from Leningrad in late January, was diverted to Montreal, where it eventually unloaded its cargo, and the Jefferson, which was in Leningrad, apparently was forced to leave without carrying freight. In late January, because of the attendant uncertainties, Allied and the Russian agency with which it contracts renegotiated their agreements and reduced Allied's purchases of wood by a value of some 16 million dollars.

Allied President Gildea testified, without controversion, that on March 12 he called Edward Con-

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[6] The remainder of the cargo was destined for Wilmington, North Carolina, Charleston, and Houston.

[7] It should be noted that, on cross-examination, Gildea testified that Gleason attributed the boycott decision to "the rank and file."

nolly, a business agent with Respondent Local 799, to determine whether anything had changed with regard to unloading a ship carrying Russian wood in Boston.[8] Connolly said that he knew of no change and that if there was to be any, it would have to come from International Vice President Hankard. Connolly also stated that Hankard would have to check with President Gleason to ascertain whether ships could be handled in Boston.

John Kaires, a vice president of Allied, testified that he and others met on March 25 with Hankard and William McNamara, another vice president of the International Union. According to Kaires, when Hankard was asked whether the Union would handle Russian cargo in Boston, Hankard replied that the Union position had not changed, but that he would discuss with Gleason at a meeting scheduled to be held the following day in New York "the matter of the possibilities of handling Russian cargo in the port of Boston." Kaires stated that Hankard also said that "the local stevedores did what they were told to do." Hankard testified, and Kaires on rebuttal "absolutely" denied, that in his discussion with Kaires he had referred only to attempting to ascertain in New York whether there had been a change in the desires of the "rank and file" members about the boycott; he did not recall mentioning Gleason to Kaires. It is my belief, based on my impression of the witnesses and the circumstances, that Kaires' version of the conversation was closer to the truth.

It appears that, as of the date of hearing, Allied had been unable to transport Russian wood directly

[8] The U.S. District Court for the Southern District of Georgia had, on March 4, issued an injunction against the ILA boycott in the ports of Savannah and Brunswick.

to the United States as a result of the boycott. Apparently, Waterman was only willing to transport cargo from Russia to Canada since the January events.

Respondents attempted here, as in the companion cases, to demonstrate that nonunion labor might have been obtained to work the Russian cargo. It seems fairly evident from the testimony that any such effort would have been unavailing. I doubt that a fully-trained gang of 20 nonunion employees could have been found to unload the Walton or the other vessels. I further note that even though Hankard testified that "employers have worked ships in the port of Boston when we've been on strike," he also testified that "scalawags" do not work ships when there is a strike going on because "the ship wouldn't be working."

Respondents undertook at the hearing the bootless task of establishing that Gleason's January 9 statement was merely advisory, and, on brief, they attack "General Counsel's attempt to characterize President Gleason's statement as an 'order'." Since Gleason himself used that word twice in his announcement, and since he even defined the breadth of his directive to provide that loading or discharging currently being done "will be worked until completion," General Counsel's characterization hardly seems ill-founded. Plainly, Gleason intended the statement to be binding on members of the Union; plainly, Gleason intended that they understand it to be obligatory; and plainly, the Union officials who testified so understood it.

There is little support here, as in the other cases, for the related claim that Gleason's directive merely expressed the overwhelming desire of the membership. Hankard did testify, without contradiction,

that only a few hours before Gleason's announcement on January 9, he received a call that longshoremen working a ship at Castle Island wanted to leave work because of the Russian cargo they were handling. Hankard said that he went to the ship and quelled the rebellion, and the men continued to perform their work. He also testified, however, that prior to Gleason's statement, he had received no indication of a groundswell for a Russian boycott from any of the eight ports under his jurisdiction. Gleason did not appear in any of these hearings to give testimony about a flood of sentiment pouring in on him from ILA members throughout the nation, and I am inclined to believe that he was not so inundated.[9]

III. Jurisdiction

At the threshold, Respondents interpose a challenge to the assertion of Board jurisdiction in these cases.

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[9] As set out hereafter, I have concluded that the complaints in all three companion cases should be dismissed for want of jurisdiction. I shall include the legal discussion on this point only in the instant decision.

Because the relevant facts of the other two cases differ somewhat from the present factual setting, I note that in *Occidental Chemical Company*, the evidence showed that in Savannah, in the aftermath of President Gleason's directive, an ILA local president confirmed that his local would not handle a foreign-flag ship carrying Russian ammonia purchased by Occidental, and a similar incident occurred in Brunswick, where another ILA local president refused to furnish longshoremen for a vessel, perhaps British-owned and perhaps under Liberian registry, bringing Russian potash bought by Occidental; and in *Kansas Farm Bureau*, the testimony established that in Houston, the presidents of two ILA locals indicated that they would not supply longshoremen so that a Russian-chartered Belgian ship could load grain being purchased by the USSR from an American grain dealer.

Relying on a line of opinions issued by the Supreme Court between 1957 and 1974, Respondents contend that the present disputes are not in "commerce" and are therefore beyond the jurisdictional reach of the Labor Board. That the issue presented is a difficult one and that Respondents' contention is respectable can hardly be gainsaid; only recently, faced with the same claim arising out of this very controversy, the Court of Appeals for the Fifth Circuit, construing the Supreme Court precedents, has concluded that the Board is without jurisdiction of this matter, and a divided panel of the Court of Appeals for the First Circuit has effectively held to the contrary. In these circumstances, it is appropriate to consider in some detail the Supreme Court authorities whose contours are thus drawn into question.

A. *The Supreme Court Cases*

The line began with *Benz et al.* v. *Compania Naviera Hidalgo, S.A.*, 353 US 138. A foreign-owned ship, sailing under a foreign flag, was struck by its foreign-national crew while temporarily in the harbor at Portland, Oregon. Three American unions picketed in support of the crew. The shipowner filed under state law for injunctive relief and damages against the unions. The issue presented to the Supreme Court was whether the Labor Management Relations Act preempted the field so as to leave the trial court without jurisdiction.

The Supreme Court concluded, after review of the legislative history of the Act, that Congress was concerned only with "industrial strife between American employers and employees." Deducing that Congress

had no specific intention to make the Act applicable to other than domestic disputes, the Court stated:

> The seamen agreed in Germany to work on the foreign ship under British articles. We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.

The effect of the ruling was to uphold the award of damages by the lower court under Oregon law against representatives of the unions.

Six years later, the Court decided McCulloch [10] and *Incres*.[11] In *McCulloch*, the Supreme Court rebuffed an effort by the Board to hold a representation election among the seamen on certain Honduran-flag vessels which had points of contact with the United States, including ultimate ownership by an American company. The Court adhered to its belief earlier expressed in *Benz* that Congress had failed to give any indication that the Act contemplated Board jurisdiction over "maritime operations of foreign-flag ships, employing alien seamen." It noted, in addition, the established rule of international law that the law of the flag state ordinarily governs the internal affairs of the ship; and that, in the case before it, the employees were already represented by another union certified under Honduran law. The Court raised the possibility that sanctioning Board jurisdiction might

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[10] *Frank W. McCulloch, Chairman* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10.

[11] *Incres Steam Ship Company, Ltd.* v. *International Maritime Workers Union, et al.*, 372 U.S. 24.

lead the Board to inquire into the "internal discipline and order of all foreign vessels calling at American ports," which activity "would raise considerable disturbance not only in the field of maritime law but in our international relations as well." It further foresaw "questions of such international import [that] would remain as to invite retaliatory action from other nations as well as Honduras." The Court concluded, as it had in *Benz*, that it would not divine that Congress had in fact exercised such authority in this "delicate field of international relations . . . [without] the affirmative intention of the Congress clearly expressed."

In *Incres*, an American union attempted to organize foreign seamen on two foreign-owned, and foreign-flag, ships. They picketed the ships, and the foreign shipowner brought an action in the New York courts for damages and injunctive relief. The New York Court of Appeals held that state court jurisdiction was preempted. The Supreme Court reversed, applying the holding of *McCulloch* that "the Act had no application to the operations of foreign-flag ships employing alien crews," and for the first time linking this construction of the Act to the statutory provisions which define the terms "commerce" and "affecting commerce." [12] In the instant case, said the Court,

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[12] Section 10(a) provides that the Board is empowered to prevent any person from engaging in any unfair labor practice "affecting commerce." Section 2(6) states:

> The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points

"[T]he IMW's activities are directly related to Incres' employer-employee relationship, since the very purpose of those activities was the organization of alien seamen on Incres' vessels." The holding below was vacated so that the New York courts might assert jurisdiction.

International Longshoremen's Local 1416, AFL-CIO v. *Ariadne Shipping Company, Ltd., et al.*, 397 US 195, was the next Supreme Court case construing the *Benz* doctrine and the only one thus far to hold that the Act affords preemptive jurisdiction over activities relating to a foreign-flag vessel. The case involved two foreign-owned, foreign-flag, cruise ships which operated between Florida ports and the Caribbean. When the ships were in American ports, they engaged some American longshoremen to do loading work. An American union picketed the vessels with placards protesting that the longshore work was being done under substandard wage conditions. The Florida courts granted injunctive relief to the foreign shipowners.

The Supreme Court thought that this case differed sufficiently from the ones previously decided so as to permit a conclusion that Congress would have desired that the Board assert jurisdiction in these circumstances. This was not a situation in which Board

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in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Section 2(7) provides:

The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

regulation of the aspect of labor relations in question would necessitate inquiry into the "internal discipline and order" of a foreign vessel which might "raise considerable disturbance not only in the field of maritime law but in our international relations as well." Unlike the prior three cases, invocation of Board jurisdiction in *Ariadne* would not likely provoke "vigorous protests from foreign governments and . . . international problems for our government," or "invite retaliatory action from other nations." Nor was there any showing that such assertion of jurisdiction would depart from "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." The Court, holding that the "longshore activities of such American residents" were not within the exempted area marked out by *Benz* and its progeny, stated:

> [T]his dispute centers on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work. There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law. [Footnote omitted.] They were American residents, hired to work exclusively on American docks as longshoremen, not as seamen on respondents' vessels.

Concluding that "application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law," the Court held that "these

longshore operations were in 'commerce' within the meaning of" the Act and that, since the picketing was arguably protected by the Act, Florida law was accordingly preempted.

Four years later, in 1974, the Court decided *Windward Shipping (London) Limited, et al.* v. *American Radio Association, AFL-CIO, et al.*, 415 US 104. In that case, several American maritime unions, concerned about the loss of jobs available to their members, agreed to take collective action against foreign vessels which they perceived as a principal cause of the situation. They picketed two foreign-owned vessels in Houston with signs calling attention to the substandard wages paid to the foreign crews and the consequent plight of American seamen.[13] The effect of the picketing was to cause longshoremen and other port workers to refuse to cross the picket lines. The shipowner sought injunctive relief in a Texas court. The Texas Court of Appeals held that the picketing did not interfere with the "maritime operations of foreign-flag ships" under the *McCulloch* standard and that the activity was arguably protected under Section 7 of the NLRA; accordingly, that court denied the request for injunction.

In reviewing *Benz* in *Windward*, the Supreme Court attributed its result not only to the "clear Con-

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[13] The signs read:

Attention To The Public

The Wages and Benefits Paid Seamen Aboard The Vessel Theomana [Northwind] Are Substandard To Those of American Seamen. This Results In Extreme Damage To Our Wage Standards And Loss To [sic] Our Jobs. Please Do Not Patronize This Vessel. Help The American Seamen. We Have No Dispute With Any Other Vessel On This Site.

gressional purpose to apply the LMRA only to American workers and employers," but also to reluctance on the part of the Court "to intrude domestic labor law willynilly into the complex of considerations affecting foreign trade." It further characterized *Benz* and the other cases which had denied jurisdiction to the Labor Board as recognition that "Congress, when it used the words 'in commerce' in the Labor Management Relations Act, simply did not intend that Act to erase longstanding principles of comity and accommodation in international maritime trade." The Court went on to acknowledge that the picketing activities in the case before it did not involve the "inescapable intrusion" into the affairs of foreign ships that was present in *Benz* and *Incres*, since neither the representation of the foreign crews nor support for such crews in their own wage disputes was implicated. However, the Court said, "[T]hose cases do not purport to fully delineate the threshold of interference with the martime operations of foreign vessels which makes the LMRA inapplicable." In explaining why that threshold was crossed on the facts before it, the Court stated:

> The picket signs utilized at the docks where the North Wind and Theomana were tied up protested the wages paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United States. At the very least, the picketers must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the

vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. Such a large scale increase in operating costs would have more than a negligible impact on the "maritime operations" of these foreign ships and the effect would be by no means limited to costs incurred while in American ports. Unlike *Ariadne*, the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country.

In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute. Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under *Benz* rather than under *Ariadne*. [Footnote omitted.]

Justice Brennan, joined by Justice Douglas and Marshall, dissented. The dissent construed the ma-

jority opinion as holding that the Act did not apply simply "because the *economic impact* upon foreign shipping from respondents' picketing might severely disrupt the maritime operations of foreign vessels," and the dissent contended that in fact the prior cases rested squarely upon quite different, and more limited, criteria—that Congress would have disapproved exercise of jurisdiction only over those cases which allowed "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels." (Emphases in original.) Justice Brennan argued that, under the precedents, the only appropriate issue is whether "NLRB cognizance of respondents' picketing would require that the Board 'inquire into the internal discipline and order' of foreign vessels," and that, under such a test, *Ariadne* would apply here. He also believed that the question of whether the dispute could be accommodated "by a wage decision on the part of the shipowners which would affect only wages paid within this country" was irrelevant because the picketing was not in fact "directed at forcing the shipowner to make that or any other accommodation that could be characterized as interference with relations between crew and shipowners. Respondents' target is to persuade shippers not to patronize foreign vessels, and respondents have no concern with the form of the shipowner's response that makes their efforts succeed." Justice Brennan went on to point out that the unions' effort to foster use of domestic shipping was entirely consistent with national policies in the maritime field and found it most unlikely that Congress was satisfied to allow the states to resolve the problem, saying, "It is inconceivable that Congress meant to leave regulation

of activity in this area of predominantly national concern to disparate state laws reflecting parochial interests."

Later in 1974, the Court was again confronted with a legal issue arising out of the same picketing campaign which had resulted in the *Windward* decision. In *American Radio Association, AFL-CIO, et al.* v. *Mobile Steamship Association, Inc., et al.*, 419 U.S. 215, the unions which had participated in the picketing in the *Windward* case engaged in similar conduct at another port, directed against another foreign ship. The legal posture of the case, however, was different. Whereas in *Windward* the plaintiff in the Texas court had been the shipowner, in *Mobile* the plaintiffs seeking an injunction in the Alabama court were the stevedoring companies which had desired to service the picketed ships and the shippers who had wished to have their crops loaded onto it. In *Windward*, the petitioning unions, seeking to assert Federal preemption, had contended that their Houston picketing was protected under Section 7 of the Act. The same unions contended in *Mobile* that, with respect to the effect of their conduct on the stevedores and the shippers, such conduct arguably constituted a secondary boycott prohibited by Section 8(b)(4) of the Act. The unions attempted, in other words, to persuade the Court that an independent controversy existed between them and the stevedoring and shipping companies which was subject to the jurisdiction of the Board, despite the fact that the dispute between the unions and the shipowner was not.

The Court majority found anomalous the claim that a state court might have jurisdiction over a complaint filed by a foreign shipowner but would be ousted of jurisdiction when the stevedore with whom the shipowner would have dealt itself sought an

injunction against the union for conduct arising out of the same dispute. The majority did not "believe . . . that the line of cases commencing with *Benz* and culminating in *Windward* permit such a bifurcated view of the effects of a single group of pickets at a single site."

The majority noted its previous reference in *Windward* to the effect of the picketing on secondary employers ("lost cargo resulting from the longshoremen's refusal to load or unload the vessels") and the recognition there that the effect of picketing on the "maritime operations of foreign ships" would be produced in large part by the refusal of the American workmen employed by domestic stevedoring companies to cross the picket line in order to load and unload cargo. Such a conclusion, the Court stated in *Mobile*, "inevitably flows from the fact that the response of the employees of the American stevedores was a crucial part of the mechanism by which the martitime operations of the foreign ships were to be affected." It followed, therefore, that "the fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in *Windward*." In summary, the Court concluded:

> Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioners' picketing did not even "arguably" violate § 8(b)(4) of the Act. Since Congress did not intend to strain through the

> filament of the NLRA picketing activities which so directly affect the maritime operations of foreign vessels, we hold that the Alabama courts were competent to apply their own law . . ..

Three members of the Court joined Justice Stewart in dissent. In the view of the dissenters, a substantial difference existed between the issue of "jurisdiction over a dispute between the owners of foreign-flag vessels and American maritime unions" (*Windward*) and "whether state courts have jurisdiction over a complaint by an association of American stevedoring companies that secondary pressure caused by the picketing of American maritime unions constituted a wrongful interference with the American companies' right to carry on their lawful business." The gravamen of the latter complaint, argued the dissent, "is precisely the type of concerted activity made subject to Board regulation by § 8(b)(4)(B) of the LMRA . . . ." If, as in *Ariadne, supra*, it was true that the longshoremem serving foreign-flag vessels are indeed in "commerce" and thus subject to the regulatory power of the Board, their employers must similarly be "engaged in commerce or in an industry affecting commerce" within the meaning of Section 8(b)(4)(B). On the assumption that the majority of the Court would allow the Board to exercise jurisdiction over the secondary aspect of the case had the unions been involved in a primary dispute with American-flag shipowners, Justice Stewart found anomalous that the Section 8(b)(4)(B) jurisdictional requirement should depend "entirely on whether in a particular case a primary labor dispute to which the stevedoring company was not privy was between an American union and an American-flag shipowner or an American union and a foreign-flag shipowner."

The dissent perceived no considerations of comity, no intrusion of domestic labor law into foreign trade, and no thrusting of the Labor Board into the delicate field of international relations, by holding that the Board had exclusive jurisdiction over the alleged secondary conduct in the case at hand: "Certainly a Board decision that secondary pressure violated § 8(b)(4)(B) would not risk interference with international maritime trade. Nor would a decision that the secondary pressure did not violate Section 8(b)(4)(B) endanger the foreign-flag shipowners' interests in preserving the integrity of their maritime operations from the impact of the unions' picketing. These interests are fully protected under *Windward Shipping* by permitting the foreign shipowner to seek an injunction in state court."

In arguing that the primary and secondary aspects of the unions' conduct were legally separable for purposes of jurisdiction, Justice Stewart noted that the only two Courts of Appeals that appeared to have addressed the question "have also sustained Board jurisdiction over secondary disputes involving American employers and unions despite the fact that the primary dispute involved foreign-flag vessels," citing *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418*, 334 F.2d 1014 (C. A. 7), and *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418* v. *NLRB*, 376 F.2d 774 (C. A. D.C.). Those two cases arose out of the same controversy. A Canadian union was involved in a labor dispute with a Canadian shipping company. In order to support the Canadian union in that dispute, an American union which represented employees of an American grain shipper induced its members at an American port to cease loading the American em-

ployer's grain onto ships owned by the Canadian employer. In both cases, the Courts of Appeals tersely rejected the contention that the Board, by virtue of *Benz* and *Incres*, lacked jurisdiction over the American union's conduct in this country. The *Madden* Court stated succinctly (334 F.2d at 1019):

> [N]o attempt is being made to regulate or to apply the Act to the "internal management or affairs" of the Upper Lakes ships; the injunction does not regulate the internal affairs of its ship. No conflict between American and Canadian policies can result from halting an illegal secondary boycott in this country, directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer.

In evident response to the citation of the *Grain Workers* cases by the *Mobile* dissent, the *Mobile* majority appended the following footnote to its textual conclusion that "[t]he fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in *Windward*":

> In so holding, we need cast no doubt on those cases which hold that the Board has jurisdiction under Section 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States. See [the *Grain Workers* cases].

B. *Discussion*

In assessing the applicability of the *Benz-Mobile* doctrine to the instant boycott, two discrete questions may require decision. The first issue is the reach

of the *Benz-Windward* line—what are its metes and bounds, what are the pertinent criteria in testing whether union conduct is not in "commerce" so as to deprive the Labor Board of jurisdiction over it. The second question which would arise, in the event of a conclusion that the "primary" dispute here might be considered, under the theories propounded in *Benz-Windward*, beyond the Board's supervisory power, is whether the dispute may nonetheless be subject to Board regulation because of its secondary character, being, it is argued, less like *Mobile* than like the *Grain Workers* cases apparently approved by the *Mobile* Court.

It should be noted that from the point of view of the Respondents and the Charging Parties, the real, practical, essential issue appears to be a narrow one: the choice of forum in which relief will be sought. As the cases reviewed above indicate, a holding that the Board is without jurisdiction leaves those parties which feel aggrieved by the respondents' conduct the alternative of pursuing state court remedies; the cases also suggest that state law may often be more hospitable to claims against unions than the NLRA would be. However, although the pragmatic stakes in the present cases may not be as consequential as the considerable litigation to which the dispute has given rise might suggest, the proper application of the Supreme Court doctrine is an analytical challenge of the first water.

1. The Applicability of *Benz-Windward* (Without Regard to *Mobile*).

Long before *Benz*, it had been accepted that Congress is capable of applying American law to foreign ships voluntarily entering American territorial limits.

Wildenhus's Case, 120 U.S. 1. Furthermore, it has been said that the "commerce" jurisdiction of the Labor Board is a broad grant by Congress of "the full sweep of its constitutional authority." *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 647. The question in the foreign-flag cases has always been whether it may nonetheless fairly be inferred that Congress, for considerations of national and international importance, intended to impose limitations on the Board's jurisdiction in particular circumstances.

The first cases in this line were much of a piece. It may reasonably be said that *Benz*, *Incres*, and *McCulloch* all concerned efforts by American unions to involve themselves in the labor relations of foreign vessels, with no apparent resultant benefit to American workingmen. The Supreme Court was of the view that in the absence of any expression of affirmative intention, it was inappropriate for the Court to conclude that Congress desired the Court "to run interference in such a delicate field of international relations" "where the possibilities of international discord are so evident and retaliative action so certain." *Benz*, 353 U.S. at 147.[14]

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[14] The repeatedly expressed fear in these cases of disrupting international relations and offending principles of comity does not specifically deal with two factors which seem to make these concerns less threatening. One is that, in all of the cases except *McCulloch*, the only apparent role which the Board might have played, on the facts in each case, would have been the potential issuance or withholding of an injunction against the picketing American union. I am uncertain how the entry of such an order, or the failure to enter one, would necessarily constitute a direct intrusion into international affairs. Furthermore, the issue in each case,

In *Windward*, however, the doctrine seemed to take a new tack. Justice Brennan argued in dissent that while the earlier cases had refused to permit "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels," the majority view in *Windward* was withholding Board jurisdiction "because the *economic impact* upon foreign shipping from respondents' picketing might severely disrupt the maritime operations of foreign vessels." 415 U.S. at 118 (emphasis in original). The *Windward* majority seemed to agree that it was engaging in an expansion of the prior cases, conceding that the picketing before it did not "involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*," but holding that those cases "do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable." *Id.* at 114.[15]

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except *McCulloch*, was whether state law was preempted by the Labor Act. The decisions in *Benz*, *Incres*, *Windward*, and *Mobile* that state laws could be applied would seem to present at least the same threat of international disruption that Board jurisdiction would foretell.

[15] It may be wondered why the majority chose to agree that *Windward* was a somewhat different breed of cat than the prior cases, and to engage in speculation about the economic implications of the picketing there. At least superficially in *Windward*, it might have been said that the American picketing which complained of substandard foreign wages was certainly as intrusive into the foreign employer-employee relationship as was the *Benz* picketing which offered American support to a strike by a foreign crew against its foreign employer; the *Benz* language about exempting from Board jurisdiction an attempt "to change the contractual provisions

Windward thus seemingly broadened the *Benz* principle, at two levels. In addition to conduct or situations which threatened to constitute potential intrusion into foreign labor relations, the *Windward* mode of analysis seemed to remove from Board jurisdiction the regulation of conduct which promised a substantial adverse economic effect upon foreign trade. And, by so expanding the inquiry, the issue no longer focused on the effect of "Board cognizance of a dispute," or whether the exercise of Board jurisdiction "would require the Board to examine into" foreign labor relations, or whether assertion of Board jurisdiction "would necessitate Board inquiry into the relations" (all the words of dissenting Justice Brennan in analyzing, in *Windward*, the prior cases); the majority rationale in *Windward* spoke only in terms of the potential economic effects of the picketing activities there.

As discussed by the *Windward* majority, there seem to be two principal determinants of whether a *Windward* situation is present: the objective of the union and the predictable impact of its conduct. Thus, the Court stated that "[a]t the very least," the union "must have hoped" to cause the forign vessels to raise their operating costs, either as a result of losing revenue or of capitulating to the picketing by increasing the wages of the foreign seamen. The end thus presumably desired by the union would have a "more

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made by these [foreign] parties," 353 U.S. at 146-147, it would seem, would have fit the *Windward* facts with a fair degree of comfort. One might assume that the Court refrained from such a mechanical analysis because it perceived that the picketing had a principal objective of shutting out foreign vessels rather than merely making them competitive with the domestic fleet.

than negligible" impact of the maritime operations of the ships, and could not be "accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country." Further, a decision by the shipowners to increase their seamen's wages would have "the most significant and far-reaching effect on the maritime operations of these ships throughout the would;" absent such a decision, the alternative choice by the shipowners of boycotting American ports "would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as in ours," bringing, in addition, the threat of "[r]etaliatory action against American vessels in foreign ports" which would probably exacerbate and broaden the present dispute."

In concluding its analysis, the Court arguably applied a test somewhat less expansive in tone than that connoted by the speculative auguries previously set out, and if the twice-used word "therefore" were to be given its full weight, the test might be said to be both clear and exclusive: "Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under *Benz* rather than under *Ariadne*."

In the present cases, the president of Respondent International issued a directive to Union members to suspend the handling of "all Russian ships and all Russian cargoes" in American ports, and subordinate Union officials complied with his order. As in *Windward*, "[a]t the very least" the Respondent Union "must have hoped" to make the use of Russian ships

and the carrying of Russian cargo disadvantageous and counterproductive; at the ultimate, as assuredly was also the case in *Windward*, the Union here sought to bring an end to the use of such ships and the transport of such cargo.[16] Like *Windward*, the end result of the Union conduct, if successful, threatened "more than a negligible impact" on the maritime operations of foreign ships and on the business of foreign entities engaged in Russian trade.

As in *Windward*, "the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country;" the only decision which would mollify Respondents "would have the most significant and far-reaching effect" on the operations of Russian shipowners (i.e., the Soviet government) and on Russian purveyors and purchasers of goods (i.e., the Soviet government); a determination by the Russian authorities to boycott American ports rather than withdraw from Afghanistan "would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as ours;" "[r]etaliatory action against American vessels in [Russian] ports" might follow, which would "probably exacerbate and broaden the present dispute;" and finally, none of the "predictable responses" to the Respondents' conduct "would be limited to the sort of

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[16] The pickets in *Windward*, as earlier noted, complained of substandard foreign wages which resulted in "extreme damage to our wage standards and loss to [sic] our jobs," and asked the public to "not patronize this vessel" and to "help the American seamen." The objective of the picketing was, in one way or another, to cause a diminution in the use of foreign vessels and an increase in the use of American ships and crews.

wage-cost decision benefiting American workingmen which the LMRA was designed to regulate—"indeed, in the present case, the Respondents sought no economic advantage or benefit for its members by the conduct in which they engaged.

After thus parsing, and then tracking, the components upon which *Windward* relied in concluding that the Board was without jurisdiction, it seems to me difficult to reach a different result in the present case. There are, very obviously, factual variations, but I cannot, in laying them next to the *Windward* language, perceive those differences as significant ones. It may seem to me that there would have been a greater theoretical chance for the American unions in *Windward* to have achieved a wage objective (although it is not easy to say that they were doing anything other than attempting to put the foreign ships out of business) than for the present Respondents to have caused the Russian government to withdraw from Afghanistan, but it may certainly be said that the sort of international reverberations about which the Court speculated in *Windward* can equally be conjectured here.

And, of course, none of the "predictable responses" to the present conduct "would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." The Respondents' action were entirely unrelated to the advancement of the interests customarily served by unions; they were wholly "political" in nature, and in fact detrimental to the immediate interests of longshoremen, by causing a reduction in the work available to them. It would seem a curious thing to hold that a union is *not* involved in "commerce," and not subject to Board jurisdiction, when, as in *Windward*,

it pursues a labor-oriented objective, beneficial to its members, by traditional union methods which promise to have an impact upon foreign trade, but *is* in "commerce", and therefore within Board jurisdiction, when it pursues a non-labor-oriented objective by similar methods which promise to have a similar impact.

This latter reasoning appealed to the Court of Appeals for the Fifth Circuit, which held, in *Baldovin* v. *International Longshoremen's Association, AFL-CIO, et al.*, 626 F.2d 445, that the conduct presently under consideration was not in "commerce" within the meaning of the *Benz* family of cases. In *Baldovin*, the Court was considering consolidated appeals from a District Court decision denying a Section 10(1) injunction sought by the Board Regional Director in Houston (here the *Kansas Farm Bureau* case) and from another District Court decision granting such an injunction in Savannah and New Brunswick (presently the *Occidental* case). In concluding that there was not even "reasonable cause" to believe that the Union had violated Section 8(b)(4), the Court reasoned as follows (*id.* at 450-454):

> As we have seen, however, the secondary boycott prohibition was designed to narrow the labor controversy into a confrontation between the primary opponents. If one of those opponents is not subject to the NLRA, for example, because it is a foreign entity or a foreign nation, and if the objective of the union is to obtain concessions of a kind that could not be achieved either by domestic action or by labor disputes of the kind encompassed by the NLRA, the boycott ban would be merely a prohibition devoid of its function. Seeking to restore the secondary boycott pro-

visions to their purpose, the Supreme Court has interpreted the commerce provisions in the statute to import two separate purposes: they set forth the basis for congressional action and the limitation on that action in accordance with constitutional concepts traditionally incorporated by those terms; in addition they limit the statutory scope of the secondary boycott provisions to those boycotts that could be remedied by domestic action.

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The Board's recent decision in *National Maritime Union of America and Shippers Stevedoring Company*, 245 NLRB No. 29 (1979), is based on the *Windward-Mobile* rationale. In *Shippers Stevedoring* a union representing United States seamen picketed a U.S.S.R. flag ship with signs protesting the use of U.S.S.R. vessels, instead of United States ships, to transport foreign cargo purchased with United States tax dollars in violation of the Cargo Preference Act, 46 U.S.C. § 1241(b)(1). Because the picketing was aimed at replacing the foreign ship and its foreign crew with a United States ship and a United States crew, the Board viewed the picketing as directly affecting the "maritime operations" of the foreign ships. Therefore, the Board found the picketing activities to be not "in commerce" within the meaning of the LMRA.

The Board itself recognized in *Shippers Stevedoring* that the *Windward-Mobile* rationale cannot be confined to union efforts directed toward changing shipboard conditions of employment. The union that was picketing in *Shippers Stevedoring* could not be mollified by a change in shipboard wages or employment conditions, nor would a wage-cost adjustment by the shipowner

end the dispute. The Board adopted as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought about by the entity's response to the activity in question.[17]

* * * * *

These union activities, a political protest against the political actions of a foreign government, in comparison with the union activities in *Windward* and *Mobile*, are even further removed from the type of domestic labor relations that the Act was intended to cover. *Windward* and *Mobile* cannot be distinguished on the basis of the purely factual differences that the unions were there conducting "area standards" picketing directly against the foreign ships, the unions had a primary labor dispute with the foreign ships and the picketing of the vessels was designed to affect directly the internal labor relations of the foreign ships vis-a-vis their foreign crews. [Footnote omitted.]

In *Windward* as here the union objective was to compel a foreign entity to change a course of action it was taking away from our shores. If the fact that the present dispute is with a foreign government over military policy makes the activity in commerce, while a dispute with a foreign employer over its labor policy would not be in commerce, then the anomalous result would be that an injunction could not issue when labor

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[17] *Shippers Stevedoring* will be discussed in greater detail *infra*.

relations are involved but could issue when they are not.

The mere fact that a boycott or picketing is aimed at a foreign entity does not, of course, *ipso facto* preclude NLRB jurisdiction. [Footnote omitted.] The object of the dispute determines whether or not it is "in commerce." When the dispute is over the hiring of American labor in United States ports, it is "in commerce." When the dispute is over the foreign vessels' relations with its foreign employees, it is not "in commerce." When the dispute is over a foreign government's invasion of a remote nation, it is more emphatically not "in commerce."

As in *Windward* and *Mobile*, the ILA's activities are outside the coverage of the Act because of the nature of the reasonable responses that would accommodate the union's complaint. Only a political decision on the part of a foreign government can satisfy the ILA's grievance. Thus, the *Windward* rationale as recognized by the Board in *Shippers Stevedoring* compels a finding that the ILA activities do not come within the coverage of the Act. [Footnote omitted.]

* * * * *

The Supreme Court decisions whose lead we follow were reached by divided courts but they read the LMRA as drawing a domestic-foreign impact line that permits domestic unions to boycott foreign vessels with the purpose of attempting to affect foreign affairs. We attempt but to interpret the congressional intent. If we fail to recognize it, the remedy lies in the hands of Congress.

It is not unmistakably clear that the secondary boycott provision is only "designed to narrow the labor controversy into a confrontation between the primary opponents," or that the provision would be "a prohibition devoid of its function" when applied to a dispute in which the one of the opponents is not subject to the NLRB and the subject of the dispute is incapable of domestic resolution. It has been held that the secondary boycott prohibition is intended principally to protect neutral employers and may apply despite the absence of a conventional primary dispute. E.g., *National Maritime Union of America, AFL CIO* v. *NLRB*, 346 F.2d 411, 418 (C.A.D.C.). In its principal thrust, however, the Fifth Circuit reads, and approves, *Shippers Stevedoring* as adopting "as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought about by that entity's response to the activity in question." That formulation appears to me to be a sound reading of both *Shippers Stevedoring*, see *infra*, and *Windward*.[18]

Only recently, the Court of Appeals for the First Circuit has also had occasion to apply *Benz et alia* to a controversy arising from President Gleason's mandate. Reacting to the facts now before me in the *Allied* case, Allied sued the Union for damages in

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[18] The Court's other isolated shorthand references to the proper test—" boycotts that could be remedied by domestic action," "the object of the dispute determines whether or not it is 'in commerce'," and "the nature of the reasonable responses that would accommodate the union's compliant"—are evidently subsumed into the more comprehensive statement set out in the text.

U.S. District Court, urging three separate causes of action. One of these was a claim under Section 303 of the LMRA, which provides a private right of action for violations of Section 8(b)(4). The District Court held that Allied was not entitled to relief under Section 303; in reversing, the Court of Appeals (Senior Circuit Judge Aldrich dissenting) construed the *Benz* line of cases as affording "commerce" jurisdiction to the facts before it. *Allied International, Inc.* v. *International Longshoremen's Association, AFL-CIO*, —— F.2d —— (January 6, 1981).

The Court read *Benz* through *Windward* (with the exception of *Ariadne*) as "involv[ing] the question whether the Act affirmatively protected union activity directed at the working conditions aboard foreign-flag vessels," and thought that the Supreme Court had decided those cases as it did because "[t]o find that the picketing in *Incres*, *Benz* and *Windward* was protected by the Act would have implied the jurisdiction of the NLRB over the foreign labor conditions that gave rise to the picketing;" such an implication would, in turn, necessitate inquiry into the "internal discipline and order" of a foreign vessel.

It may be argued that the Court's reading of *Benz*, *Incres*, and *Windward* is erroneous insofar as it finds in *Windward* merely a desire on the part of the Supreme Court to avoid an implicit claim of Board jurisdiction over the internal order and discipline of a foreign vessel. As earlier discussed, the majority of the Court in *Windward* seemed to agree with the dissent there that it was expanding the exception beyond "the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*" to include, in the underscored words of the dissent, disruptions having an "*economic impact* upon foreign shipping." As I read the majority opinion in *Wind-*

ward, its dilation of the possible economic ramifications of the picketing miiltates against the First Circuit's characterization of *Windward* as reflecting nothing more than a reiteration of the pre-*Windward* doctrine which only attempted, as the *Windward* dissent put it, to preclude "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels . . .."

Initially, the First Circuit seemed to be concluding that the principal reason for distinguishing *Incres*, *Benz*, and *Windward* was that, as it happened, no foreign entities were as directly involved as they had been in those cases, and therefore no considerations of comity and accommodation in international trade obtained: "Here, an American union has ordered its members not to work for an American stevedore which had contracted to service an American ship carrying goods of an American importer, insofar as the work would involve handling goods originating in the Soviet Union. There is no question of interference in the affairs of a foreign employer." Thereafter, however, it becomes clear that the First Circuit was focussing on the absence of a primary "labor" dispute. The Court pointed out that the "primary dispute" before it was between the ILA and the U.S.S.R. over the military policy of the latter, and it "would be absurd to contend that application of the secondary boycott provisions would imply NLRB jurisdiction over *this* primary dispute, *i.e.*, over Soviet military policy" (emphasis in original).

The Court then went on, in the context of a discussion of the effect of the *Mobile* case, to conclude that *Windward* (and, *a fortiori*, *Mobile*) does not apply to the present facts because the "primary"

controversy here was not a "labor" dispute. It stated:

> We read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a "primary dispute" cannot be extricated from a "secondary dispute" for purposes of contrary jurisdictional findings.
>
> Here, however, there is no attempt to "bifurcate" the effects of a single union action. The *only* labor-related activity in issue has been played out by an all-American cast. The fact that this domestic dispute was inspired by military events in foreign lands—events far beyond NLRB jurisdiction—does not counsel against application of the NLRA to the labor dispute ongoing here at home. In sum, none of the considerations that prompted the Court in cases such as *Windward*, *Incres*, and *Benz* to find the Act inapplicable have force in this context. [Emphasis in original.]

In a subsequent footnote, responding to the dissenting opinion, the majority emphasized its conclusion that *Benz-Mobile* applies only where a "primary" "labor" dispute exists; since no such dispute could be found here, the problem of "bifurcation" presumably becomes irrelevant: "[W]e think those cases are adequately explained on the principle that in a case involving *intertwined* 'primary' and 'secondary' *labor* disputes, lack of Board jurisdiction over the primary dispute will preclude Board jurisdiction over the secondary conduct—more particularly where a contrary ruling might well suggest an improper interference by the United States in the

relationship between foreign employers and laborers" (emphasis in original).

If I am interpreting the majority opinion correctly, it did not rely on the *Grain Workers* cases previously described (although it discussed them) to conclude that the instant facts permitted separate consideration of secondary conduct; rather, it held that the *Benz-Windward* prong of the doctrine did not apply at all, since those cases require a threshold finding that the "primary" dispute is "labor"-related in order for any aspect of the dispute to even tentatively qualify for exemption from "commerce." It does seem that, were the primary controversy here a "labor" dispute, the majority might have held that any secondary character of the conduct was not separable ("We read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a 'primary dispute' cannot be extricated from a 'secondary dispute' for purposes of contrary jurisdictional findings.")

Senior Circuit Judge Aldrich dissented on this count. In his view, the *Benz* line "establishes the general proposition that the NLRA does not reach, directly or indirectly, labor controversies in which the 'primary' dispute relates to the internal affairs of a foreign entity (in those cases, foreign shipowners)." Judge Aldrich believed that the present "primary" dispute fell within that category, and, because of *Mobile*, he found no basis for coverage of the "secondary" aspects of the dispute: "[T]he internal management or affairs of foreign entities are none of the Board's business, directly or indirectly." [19]

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[19] Judge Aldrich, however, would have held actionable Allied's tort claim in admiralty based on the Union's asserted

2. The Meaning of *Mobile*.

As indicated above, I am inclined to agree with the Fifth Circuit (and Judge Aldrich) as to the general applicability of *Windward* to disputes of the present kind. Had Respondents simply engaged in picketing of Russian ships and cargoes, no further analysis would be required. But certain language in *Mobile* raises a question as to whether the form of action engaged in by Respondents—overt inducement of members not to work on Russian ships and cargoes for secondary employers, rather than primary picketing of such ships and cargoes—requires a different result.

Until *Mobile*, the problem of what activity did or did not affect "commerce" for jurisdictional purposes had been treated more or less as an abstract question —given the conduct and either its effect on principles and circumstances of international relationships (*Windward*) or the effect thereon resulting from Board inquiry into the conduct (*Benz* and the others), should the Board be denied authority to regulate (or to refuse to regulate) the conduct? The issue was not evaluated in conventional labor law terms of "primary" or "secondary" disputes or employers, or by examining the relationships between the parties involved in the situations.

In *Mobile*, however, the argument was made that

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wrongful interference with existing and prospective business relationships. The majority had held, under analogous Supreme Court precedent relating to the displacement by Section 303 of state law damage actions based on peaceful secondary picketing, that a claim in tort under federal common law also did not survive the enactment of Section 303. See *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252.

the "commerce" analysis might be affected by the identity of the parties appearing in the state court, thus to some extent introducing labor law party concepts into the jurisdictional question. Given that state court jurisdiction is not preempted when the *foreign shipowner* sues the union for picketing, could that jurisdiction nonetheless be precluded by federal law when *the American stevedoring company* sues the union for interfering with its business by virtue of the same conduct, a conflict which might arguably fall within Section 8(b)(4) of the Act?

The *Mobile* majority said no, pointing out that since the response of the stevedore's employees to the picketing was a "crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected," the "effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same" regardless of which party complains about it. "[A]ctivities" which "plainly were not" "commerce" in *Windward* do not become "commerce" simply because a stevedore or a shipper, rather than a shipowner, invokes the state court's jurisdiction. The majority rejected "the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its *statutory* authority over unfair labor practices 'affecting commerce'" (emphasis in original). This approach seems to suggest that where the underlying controversy has *Benz* or *Windward* implications, secondary behavior connected with it also falls outside the Board's jurisdiction; if the Board cannot hear a complaint by a foreign shipowner, it also cannot hear a complaint by a stevedore arising from the dispute between the union and the shipowner.

Nonetheless, the Court seemed to preserve the viability of the *Grain Workers* cases, citing them in a footnote and saying that its ruling in *Mobile* "cast no doubt on those cases which hold that the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is outside the United States." It is argued that this apparent approval defines and limits *Mobile*, marking out the boundaries of certain "secondary" conduct as to which the Board, post-*Mobile*, retains jurisdiction. As previously described, in the *Grain Workers* cases, a Canadian union was engaged in a dispute with Upper Lakes, a Canadian shipping company. To support the Canadian union, an American union induced its members, employees of Continental Grain, an American company, not to load Continental's grain on Upper Lakes' ships while the latter were in Chicago to take on grain at Continental's elevator. The Board, the Seventh Circuit, and the District of Columbia Circuit all agreed that the American union's conduct was in "commerce," not governed by *Benz et alia*, and violative of Section 8(b)(4).

What sort of conduct, if any, was the *Mobile* Court saving for Board jurisdiction "even though the primary employer is located outside the United States?" Putting aside the *Grain Workers* footnote, and examining only the body of *Mobile*, the text seems to suggest a comprehensive, rather than a narrow, ban on assertion of Board jurisdiction over secondary conduct related to a primary *Windward* dispute.

It could, perhaps, be argued that the square holding in *Mobile* is limited to its known facts; that the Court was saying nothing more than that "primary" picketing always subsumes an intention to embroil

secondary employers, and since the latter are inherently victimized by the "primary" picketing, and since that picketing has been held to have certain consequences which place it beyond the Board's jurisdiction, to allow the Board an opportunity to examine into the conduct would possibly permit it to inquire into "activities" already adjudged not to be in "commerce."

It could also, and perhaps more persuasively, be argued that the Court was holding that *any* secondary conduct related to the picketing was beyond the Board's jurisdiction; that is the implication of the broad statement that "Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioners' picketing did not even arguably violate § 8(b)(4) of the Act." 419 U.S. at 228.

It is contended, however, that the *Grain Workers* cases noted with apparent approval by the Court authorize Board jurisdiction here because, as in those cases, an American union has induced employees of American companies to withdraw their services from their employers in order to affect foreign employers. The proffered distinction is that where the union's action is *first* directed against the American employer, by inducement of his employees, the conduct is in "commerce," as in the *Grain Workers* cases, whereas when the union, impelled by the same motivation, directly engages in picketing of the foreign employer, with the underlying purpose of inducing its members who work for a secondary employer to

refuse to work, that conduct is not in "commerce," as in *Mobile*. This seems to be the alternative line of argument advanced here by the General Counsel:

> Put another way, when a domestic union's conduct is directed immediately at a foreign person whose operations involve activities both within and outside of domestic "commerce," the inquiry as to whether the conduct is "in" or "affecting commerce" for the purposes of the Act necessarily focuses on the question whether the object of the union's conduct is to affect the domestic commercial activities of the foreign entity, as in *Ariadne*, or to affect its operations extending beyond domestic commerce, as in *Windward-Mobile*. If the former, the Board has jurisdiction; if the latter, the Board's jurisdiction does not lie. However, where, as in *Grain Workers* and in the instant cases, a domestic union's conduct is immediately directed at a domestic person whose operations are indisputably in commerce, that conduct is also "in commerce," regardless of whether the union's ultimate object is to indirectly influence the non-domestic commerce activities of a foreign entity.[20]

General Counsel thus asserts that, even when conduct might ordinarily appear to be *Windward*-ex-

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[20] Earlier in his brief, General Counsel had taken the position that *Windward* applies only to union action "designed to . . . directly affect the labor relations of foreign vessels vis-a-vis their foreign crews or otherwise intrude into the maritime operations of foreign-flag ships," and was thus "inapposite to the instant proceedings." The argument quoted above is made on the *arguendo* assumption that *Windward* may also apply to "jurisdictional issues extending beyond the confines of maritime operations of foreign-flag ships."

cluded from Board jurisdiction, where that conduct is "immediately directed" at a domestic person, the *Grain Workers* cases apply without further consideration of the object of the conduct.[21]

But since *Windward* seems to hold that the question of Board-or-state jurisdiction over certain activity may be determined by an assessment of the impact of the activity itself upon foreign trade, does it make sense, for purposes of determining whether the "activity" is in "commerce" or not, to make the answer turn upon the identity of the party "first" affected by the activity? *Mobile*, and the implication of General Counsel's argument earlier quoted, stand for the proposition that had the ILA authorized the use of pickets in the various ports, picketing the Russian ships or cargo as they attempted to leave or arrive, any concurrent secondary motivation for the activities, no matter how blatant, would be outside

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[21] I have some trouble with this analysis, aside from that set out above, *infra*. For one thing, as we have seen, the *Windward* majority spoke not simply of the union's "object" but also of the foreseeable reverberating effects on the foreign entity and other parts of the trade community, including the United States. For another, the contention that, in the present case, the conduct is "immediately directed" against a "domestic person" rests on the notion that the Respondent International's order to withhold labor has its first impact upon the domestic secondary employers. As the Court pointed out in *Mobile*, however, that same impact characterized that situation: "[T]he response of the employees of the American stevedores was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected." 419 U.S. at 224. It may be said that the order here was not any more "immediately directed" at the stevedores than the picketing in *Mobile*, which was designed, as the Court said, to influence their employees to refuse to work.

the Board's reach.[22] If that is the correct proposition, I find it difficult to believe that the Court intended to create such a tenuous distinction—that, in deciding the jurisdiction of the Board over two forms of union activity having the identical impact on foreign trade, it is improper for the Board to assert such jurisdiction when the impact is caused by union picketing of a foreign ship accompanied by the most unmistakable evidence that the picketing has a secondary objective, but it is not improper for the Board to assert jurisdiction when the union omits the picketing and simply engages in secondary conduct. The result of such a rule would be that if the Union wished to opt for state rather than Board jurisdiction during the next Afghanistan, it would order picketing rather than issue a press release (and then, if it desired, within the confines of that picketing, engage in open and notorious secondary conduct).

While it seems unlikely to me that the Court would have attached meaningful weight to such a distinction, the *Grain Workers* footnote in *Mobile* cannot be ignored. The Fifth Circuit in *Baldovin, supra*, 626 F.2d at 453, n. 5, thought that the *Grain Workers* cases were distinguishable from the present situation, but felt that no "bright line can be drawn between them" and the instant boycott, and in *Allied International, Inc., supra*, Judge Aldrich said in dissent that despite the Supreme Court's indication that its holding in *Mobile* "need cast no doubt on" the *Grain*

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[22] Such as, e.g., picketing having a demonstrable purpose of inducing longshoremen not merely to honor a picket line, but "to engage in concerted conduct against their employer to force him to refuse to deal with the struck employer," *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *NLRB*, 366 U.S. 667, 673-674.

Workers cases, "[t]o [his] mind, *Mobile* casts considerable doubt on them." [23]

It may be that the *Mobile* Court saw the following difference between the cases. In the *Grain Workers* cases, a "primary" dispute existed between the Canadian employer and the Canadian union prior to the American union's decision to take action. In one of the *Grain Workers* cases, 376 F.2d 774, 776, the D.C. Circuit said that the "short answer" to the *Incres* contention there made by the union "is that the Board is not here exercising jurisdiction over the

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[23] The Fifth Circuit essayed the following distinctions between *Mobile* and the *Grain Workers* cases:

> The American union's objective was to prevent the American employer from doing business with the Canadian shipper and thus to embroil the American employer in the foreign labor dispute. The objective was to influence action in the United States, not abroad. The union activity was designed to affect directly the American employees in their relationship with their American employer, thus bringing the *Grain Elevator* cases more closely in line with *Ariadne*, where the Act was applicable, than with *Windward*, where the Act was inapplicable. While we think that the *Grain Elevator* cases are distinguishable from the present cases, the distinction is solely one of degree and we cannot say that a bright line can be drawn between them and the present cases.

In *Allied International, supra*, the First Circuit discussed the *Grain Workers* cases, but did not seem to rely heavily on them or on any purported dissimilarity between picketing and a "hot cargo" order; as described above, the Court thought *Mobile* applied to oust Board jurisdiction of secondary conduct only where the Board has no jurisdiction of the primary dispute "in a case involving *intertwined* 'primary' and 'secondary' *labor* disputes" (emphasis in original), which is not the present case. The Court thus did not reach the *Mobile* issue.

Canadian primary dispute, but over secondary activity in this country . . .." It may be that the *Mobile* majority felt that secondary American conduct relating to an extant and active controversy between foreign disputants could not have the same potential for disruption of foreign commerce as might be engendered by a freshly-created direct dispute between an American union and a foreign entity.

I merely speculate; the Court did not indicate that its footnote was based on such a theory. It should be kept in mind, in appraising this footnote and its meaning, that the *Grain Workers* reference was, after all, *obiter dictum*; since the allusion to those cases was unnecessary to the decision, it cannot be regarded as a thoroughly considered definition of the dimensions of *Mobile*. For the reasons previously given, I am inclined to conclude that (1) the *Grain Workers* cases were thought by the Court to be applicable only to an ongoing foreign primary dispute, on the reasoning suggested above, or (2) the footnote approval of those cases does not represent a mature consideration of their implications, as previously discussed.

3. The Relevant Board Cases.

Two cases decided by the Board bear out the present issue.

Respondent ILA has engaged in boycotts for "political" purposes before, and in *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.)*, 146 NLRB 723, the Board was confronted with the first of these. On that occasion, in 1962, ILA issued a press release setting out the steps it was taking to eliminate trade with Cuba, including a determination not to "load or unload cargo of any

nature in ships of any owner whose vessels are used in trade with Cuba." An ILA local accordingly refused to refer employees to a Maryland stevedore to fit the Tulse Hill, a blacklisted foreign ship manned by foreign nationals.

In holding that the respondent unions had violated Section 8(b)(4) as charged, the Board made a footnote rejection of the respendents' contention that the Board was without jurisdiction because "the Tulse Hill is a foreign-flag vessel manned by an alien crew.' The Board, citing *Incres* and other cases, stated (146 NLRB at 724, n. 3), "As the instant proceeding involves no issue bearing upon labor relations aboard the Tulse Hill, its registry and the composition of the vessel's crew are immaterial in determining the Board's power to entertain Ocean's unfair labor practice charges against Respondents." [24]

I do not view the Board's evaluation in *Ocean Shipping* of its jurisdictional authority as necessarily binding upon me. That case was decided in 1964, and while the Board accurately reflected the reach of *Benz-Incres* at that time, it may fairly be said that *Windward* and *Mobile*, handed down 1974, represent

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[24] On review, a panel of the Fourth Circuit, Judge Bryan dissenting, reversed the Board's finding of violation on the ground that the Board has no jurisdiction over controversies which are not "labor disputes" as defined in Section 2(9) of the Act. The panel majority also went on to hold that Section 8(b)(4) was inapplicable to the dispute for other reasons. 332 F.2d 992. Soon thereafter, the Board expressed disagreement with the Fourth Circuit's holding that a "labor dispute" is a prerequisite to Board jurisdiction under Section 8(b)(4), *National Maritime Union of America (Weyerhaeuser Lines)*, 147 NLRB 1317, and, since then, several courts have indicated disapproval of the Fourth Circuit's position, e.g., *National Maritime Union of America* v. *NLRB*, 346 F.2d 411, 415 (C.A.D.C.).

an extension of the doctrine, beyond the "labor relations" of a foreign vessel, which renders *Ocean Shipping* obsolete to that extent.[25]

A recent Board decision, on the other hand, must be deemed a more timely assessment of current Supreme Court authority. In *National Maritime Union of America (Shippers Stevedoring Company), supra,* 245 NLRB No. 29, decided in 1979, the claim was successfully advanced by the respondent union that *Windward-Mobile* displaced Board jurisdiction of the dispute. There, a union which represented American seamen picketed, in the port of Houston, a Russian-owned vessel carrying a cargo of German-built automobiles. The underlying grievance was ostensibly that the carriage of such cargo by the Russian ship violated a United States law requiring that half of all cargo funded by a United States government agency be transported in American-flag vessels.[26] Picket signs protested "Sending U.S.A. Tax Dollars to Support U.S.S.R. Merchant Fleet." ILA longshore employees requested by the charging party stevedoring company did not report for work during the picketing. The General Counsel issued complaint under Section 8(b)(4)(i)(ii)(B). The union argued that the Board was without jurisdiction.

After liberally quoting *Windward* and *Mobile*, the Administrative Law Judge held concisely:

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[25] The same staleness consideration applies to the Board's assertion of jurisdiction in one of the *Grain Workers* cases, decided in 1965. *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Association, Local 418, AFL-CIO (Continental Grain Company)*, 155 NLRB 402, 403, n. 6.

[26] Other evidence, however, suggests that the union was more generally attacking the use of foreign vessels to transport American-purchased cargo.

The General Counsel argues that since the picketing in the instant case was not directed at the employer-employee relationship of the Skulptor Golubkina, the Supreme Court's opinions in *Windward* and *Mobile* are not dispositive of the issues in this case. I disagree.

The Court in *Windward* set forth in effect that virtually none of the predictable responses of a foreign shipowner to picketing of the *Windward* type would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. The facts in the instant case warrant, in my opinion, even more so such a conclusion and, similar to the Court's opinions in the *Windward* and *Mobile* cases, that the picketing of the Skulptor Golubkina was not "in commerce" as defined by the Act.

Thus, I find it clear that the picketing activities of the Union directed to the foreign-flag ship, Skulptor Golubkina, was not picketing "in commerce" within the meaning of the LMRA. The *Mobile* case reveals that a bifurcated view of such "commerce" was not permitted as regards employers, employees, or persons loading or unloading such commerce, and that such picketing activities as regards such employers, employees, or persons were not covered by the Act.

In adopting the recommendation of the Administrative Law Judge to dismiss the complaint, the Board indicated no reservations about his rationale or result.

It should be noted that in rejecting the General Counsel's contention that *Windward* and *Mobile* were not controlling because the picketing was "not directed at the employer-employee relationship"

aboard the vessel, the Administrative Law Judge did so by relying on that portion of *Windward* which adverted to the determination that "none of the predictable responses of a foreign shipowner to picketing of the *Windward* type would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." The Charging Parties in *Kansas Farm Bureau, et al.* vigorously attack this analysis as an unwarranted truncation of the more comprehensive *ratio decidendi* set forth in the *Windward* case.[27] I must say that in the context of *Shippers Stevedoring*, I am not sure what one might consider to be the projected "predictable responses" of the Russian government, which owned the vessel; the evidence makes it clear, in my view, that the protest was really directed at the United States Department of Transportation.[28] Nonetheless, the ultimate objective of the picketing was to affect the choice of vessels used to transport American goods, and thus to influence adversely the future operations of many foreign vessels in the American trade (including, but not limited to, the Russian vessel involved in the case).

If I were to conclude that the Board, in *Shippers Stevedoring*, has approved a test under which jurisdiction is measured by the single question of whether or not the predictable responses of a foreign entity

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[27] On the other hand, the Charging Party in *Occidental Chemical Company* believes that the Administrative Law Judge in *Shippers Stevedoring* "correctly thought this fact important because it illustrated why, under the particular circumstances of the case, the test for Board jurisdiction, absence of conflict with foreign labor and maritime laws or policies, was *not* satisfied" (emphasis in original).

[28] See *Shippers Stevedoring*, ALJD pp. 5, 7, 8.

to a union's antagonistic conduct might extend beyond the kind of "wage-cost decision benefiting American working men which the LMRA was designed to regulate," I would have to say, as to the present cases, that the predictable responses here plainly would so exceed that kind of decision, and hence the Board would be without jurisdiction (unless *Mobile* permits jurisdiction because of the nature of the present conduct). If I were to assume that the Board *sub silentio* applied a broader test, assaying, as the Court seemed to do in *Windward*, the substantiality of the international ramifications of the conduct, it would follow that the Board thought that the picketing, which ultimately sought a reduction of unspecified foreign vessels used to transport American cargo, portended the sort of consequences which brings union conduct within the *Windward* exemption.[29] Either analysis, it seems to me, tends to argue for also finding absence of jurisdiction in the present case (prescinding, again, the *Mobile-Grain Workers* issue, to which I now turn).

The net result of *Shippers Stevedoring* was to hold that the Board could not "bifurcate" the case and find Section 8(b)(4)(i)(ii)(B) applicable, regardless of the assertedly unlawful conduct in which the union had engaged. Although the General Counsel had attempted to establish a separable objective of

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[29] The *Kansas Farm Bureau et al.* Charging Parties suggest that *Shippers Stevedoring* was an ill-considered decision, probably because released in the well-known end-of-the-fiscal-year "flurry" of Board decisions. I note, however, that the Board did not adopt the Administrative Law Judge's decision until some 8 months after its issuance, an unusual delay which arguably indicates that the Board paid careful attention to the problem. As I read Occidental's brief, it finds no fault with the result in *Shippers Stevedoring*.

ensnarement of the longshoremen scheduled to unload the vessel, the Administrative Law Judge refused to consider or analyze the evidence pertinent to this contention, despite his conclusion that the sole objective of the picketing was secondary in nature.[30] In doing so, he seemed to be holding that whether or not a separable secondary violation might be found within the confines of "the picketing activities of the Union," any such conduct would be too enmeshed with the activity already determined to be not in "commerce" to permit independent consideration and adjudication. The complaint was thus dismissed without any examination into the possibility of a distinct unfair labor practice being contained within the general boundaries of the primary picketing.[31]

In my view, *Shippers Stevedoring* goes a long way toward dictating a like result in the present cases.

4. The Positions of the Parties.

Perhaps indicative of the anfractuous character of the present issue are the positions enunciated by the General Counsel and the Charging Parties in each case. As I read their analysis, and I hope that

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[30] The Administrative Law Judge found that "the only objective in the picketing was to cause employers or employees who were involved in or were assigned to or were unloading the Skulptor Golubkina to cease doing so."

[31] In *Baldovin, supra*, as set out previously, the Fifth Circuit accorded great weight to *Shippers Stevedoring*, construing it to "adopt [ ] as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought about by the entity's response to the activity in question."

I do not misrepresent them, none of the proponents of the violations charged quite agrees with any other about the apropriate rationale for finding the existence of Board jurisdiction here.

I have earlier discused General Counsel's interpretations of *Windward* and *Mobile*. The brief submitted by the Charging Parties in *Kansas Farm Bureau et al.* would limit *Windward-Mobile* to conduct relating to union "interference with the maritime operations of foreign vessels" and no more; since, these Charging Parties contend, Respondents have not "taken any steps, including picketing, designed to affect foreign maritime operations," and such interference "is neither an object of the union's conduct here nor an essential part of the mechanism through which the union intends to achieve its objectives," the Supreme Court cases do not apply. I am unable to agree with this contention.

Perhaps the argument is more esoteric than I recognize, or perhaps it is an effort to hold the union to its claim that it had no desire to interfere with anyone's business, but I cannot find any basis for the assertion that President Gleason's order did not intend to interfere with, *inter alia*, the maritime operations of foreign vessels. Elsewhere, these Charging Parties state that the Board has "recognized that the secondary effects of a political boycott are necessarily the *heart* of such union conduct" (citing *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.)*, *supra*), and it seems clear that imputing such secondary intentions to the Union cannot be done without also imputing an intention to have an impact upon foreign trade.

The brief for the Charging Party in *Occidental* summarizes:

> [In *Windward* and *Mobile*,] [t]he one respect in which the Court extended the earlier decisions was in broadening the area in which principles of comity would come into play. As the *Windward* Court observed, "[t]he picketing activities in this case do not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*." 415 U.S. at 113. Instead of excluding from the Board's jurisdiction only those cases in which there was an "inescapable" conflict with the labor and maritime laws and policies of a foreign government, Congress, the Court concluded, also intended to exclude from the Board's jurisdiction those disputes in which conflict with foreign labor and maritime laws and policies was merely likely. An increased sensitivity to the need to avoid conflict with foreign labor and maritime laws and policies clearly does not indicate that the Court abandoned its view that the presence of such conflicts was the touchstone for determining the jurisdiction of the Board. (Footnote omitted.)

The problem with this formulation is the assertion that after *Windward*, the litmus test was still limited to the existence of "conflict with the labor and maritime laws and policies of a foreign government." My reading of *Windward*, consistent with Justice Brennan's, is that the Court moved beyond the possibility of that kind of conflict and incorporated, as well, the possibility of substantial adverse economic impact on a foreign party and foreign trade.

Finally, Allied International, Inc., argues:

> Allied reads the essence of *Windward* and *Mobile Steamship* as being that considerations of comity

demand that union action that has the intent including foreseeable consequences of requiring a foreign entity to make a significant management decision be deemed to be not "in commerce" within the meaning of the NLRA . . .. In short, the Board loses jurisdiction only because it is foreseeable that the union's conduct can achieve its intended effect of significantly and directly affecting a foreign management decision. If it is foreseeable that the Union's conduct will be totally ineffective in achieving its foreign objective then there is no underlying comity interest to be served by withholding NLRB jurisdiction . . .. No reasonable person could possibly believe that the ILA's boycott will foreseeably have the slightest chance of forcing Russia to abandon its invasion of Afghanistan . . .. If the test for whether the Board does or does not have jurisdiction is to be the foreseeable effects of the union's conduct upon foreign nations or nationals as compared to Americans, then it becomes not at all "anomalous" that in some situations the Board would have jurisdiction when the primary dispute was not a labor dispute but would not have it in other situations when the primary dispute was a labor dispute. See *Baldovin* supra p. 2554 of 105 LRRM. The question of whether or not the primary dispute is a labor dispute has absolutely nothing to do with the fundamental principles of comity and accommodation in international trade upon which *Windward* and *Mobile Steamship* are predicated. By the way of contrast, the foreseeable results or lack thereof of the union's conduct upon foreign governments and foreign nationals has everything to do with

those fundamental principles of comity and accommodation.

Allied thus accepts that the *Windward* principle may apply where "foreign governments and foreign nationals," not simply foreign shipowners, are affected by union conduct. Further, it recognizes that *Windward* addressed the foreseeable consequences of domestic union conduct upon foreign enterprises. It errs, I think, in saying that *Windward* applies only where the union's ultimate objective is capable of achievement. *Windward's* analysis concerned itself with the effect of picketing activities which "directly affect" foreign maritime operations. There is no reason to believe that the "commerce" question should rise or fall on the issue of whether the union will be eventually gratified in its ultimate goal. When an immediate *Windward* impact is threatened against a foreign employer, there would seem to be as much of an "underlying comity interest to be served" by withholding Board jurisdiction as there was in *Windward*, regardless of the unlikelihood of union success in attaining its final objective.

Finally, Respondents argue that what is determinative on the "commerce" question is "the character of the dispute," and that when the dispute is about a "foreign government's invasion of a remote nation, it is . . . emphatically not" in "commerce." This argument does not, it seems to me, track with total fidelity the *Windward* decision, which engaged in a detailed speculative investigation of the economic consequences of the union's conduct there, examining the "predictable responses" of the employer and weighing, as well, the absence of benefit to American workingmen from that conduct.

Concluding Discussion

It is my obligation, of course, to apply the law consistently with the guidance provided by the Supreme Court and the Board. As I understand that guidance in the light of the *Windward* gloss on *Benz*, and the *Shippers Stevedoring* gloss on *Windward*, union conduct which is intended to disrupt foreign commerce and its instrumentalities, and which has the real capability of disrupting such commerce to a meaningful extent and beyond any immediate domestic benefits which could accrue to American workers, is not within the reach of Board jurisdiction, but rather is exclusively subject to state laws.[32] In the present cases, it was clearly the purpose of Respondents to significantly subvert the foreign trade engaged in by the Soviet Union, and the Union conduct to that end threatened the sort of ramifying consequences, affecting the Russian economy, without countervailing and limited benefit to domestic workers, to which *Windward* referred. Accordingly, *Windward* and *Shippers Stevedoring* both apply, unless the *Grain Workers citations* by the *Mobile* Court argue to the contrary.

In my view, the approval in *dicta* of those case was either confined to their particular facts, distinguish-

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[32] The logic of *Windward*, I think, compels a conclusion that the doctrine is not confined to conduct affecting "the maritime operations of foreign ships," but extends to foreign commerce in general. If, as here, a union intends to affect, *inter alia*, the operations of a foreign purveyor and purchaser of goods, the same sort of spiral of economic consequences is entailed as that envisioned by the *Windward* Court. I further note that *Windward* described *Benz* as demonstrating a reluctance by the Court to intrude domestic law into the complexities affecting "foreign trade." 415 U.S. at 110.

able from the present situation, or cannot be construed as a considered disposition of the issue. I do not believe that the Supreme Court, *in determining whether Board or state law should apply to union activities*, would hold that the Board may assert jurisdiction when, as here, the union orders its members not to work for secondary employers, even though, under *Mobile*, the Board would be without jurisdiction if the union simply chose to accomplish the identical end by picketing, including the sort of picketing which the Board might otherwise consider to constitute a violation of Section 8(b)(4). There is no reason to believe that the Court would, *for purposes of assigning jurisdiction*, attach any weight to such a nebulous and controllable distinction. And further, as discussed, it appears to me that *Shippers Stevedoring* holds that if the "primary" dispute falls within *Windward*, separable secondary conduct in support of it falls within *Mobile*.

I shall, accordingly, recommend dismissal of the complaints in all three cases. The special facts in *Allied International* do not, I think, warrant separate treatment. No foreign vessels or crews were, it is true, involved in the *Allied* case; but the targeted Russian cargo sufficiently embroils a foreign government so as to bring the *Allied* situation within the reach of *Windward*.

As noted long ago, I cannot discern any great practical significance, from the point of view of the nongovernment parties, in whatever result is reached in these particular cases. As far as I can see, if the Labor Board is not available to the Charging Parties, the state courts then become the forum to which they turn. I am, I must say, rather puzzled as to why the Charging Parties have championed with such vigor

the Board's exclusive jurisdiction over this subject matter, and equally puzzled why the Respondents have so fiercely resisted that jurisdiction. It would appear that secondary employers might prefer, in this area, as much access to the state courts as possible, since not only do state laws seem to be less protective of unions engaged in this sort of activity,[33] but also the employers invoking state laws are entitled to do so without having to convince a public prosecutor. Undoubtedly, however, the parties all have good reasons for the postures they have taken in this litigation.[34]

Having concluded that the Board is without jurisdiction, I need not dwell on the further issues presented. I would say, however, after preliminary consideration, that it is probable that the Board would find the principal violations alleged and that the First Amendment claims advanced by Respondents are not well-taken. Recognizing that some higher authority might disagree with my conclusion on the jurisdictional issue, I have made, I believe, all factual and inferential findings which would be necessary or useful in further processing of the cases.

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[33] While the Supreme Court held in *Local 20, Teamsters Union* v. *Morton, supra*, 377 U.S. 252, that state laws awarding damages against peaceful secondary picketing are supplanted by Section 303 of the Act, states would presumably be allowed *pro tanto* to award damages under their laws whenever it is held that union conduct is not "activity affecting commerce," a prerequisite to the application of Section 303.

[34] It also appears that arbitral relief may be available in such a situation. In Houston, in February 1980, an arbitrator found that the boycott violated the no-strike provision of the bargaining agreement, and ordered the two ILA locals and the District to desist from participating in it.

Conclusions of Law

1. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

2. The activities complained of herein are not in "commerce" within the meaning of the Act, and the complaint must therefore be dismissed for want of jurisdiction.

Upon the foregoing findings of fact and conclusions of law, I issue the following recommended: [35]

ORDER

The complaint is hereby dismissed.

Dated: Washigton, D.C. March 16, 1981

/s/ Bernard Ries
BERNARD RIES
Administrative Law Judge

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[35] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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